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No. 08-

In the Supreme Court of the United States

MARCUS A. BORDEN,
Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; and DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Lee v. Weisman*, 505 U.S. 577, 599 (1992), this Court reserved for future decision the question of public school educators' Establishment Clause obligations when they interact with public school students who are exercising their constitutional right to engage in religious acts. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000), this Court confirmed the constitutional right of public school students to pray in public schools "at any time" but did not decide the corollary question of what public school educators are allowed and not allowed to do under the Establishment Clause when students engage in prayer in their presence. This petition squarely presents the question reserved in *Lee,* not addressed in *Santa Fe,* but of vital importance to public school educators in this country:

Do public school administrators, faculty, coaches and staff violate the Establishment Clause if they make secular gestures of silent respect in response to constitutionally protected student-initiated religious acts?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdictional Statement 1

Relevant Constitutional Provisions 2

Statement of the Case 2

A. Factual History 2

B. Procedural History 4

Reasons for Granting the Petition 12

I. The Third Circuit's Decision Conflicts With Decisions of This Court and Other Circuit Courts as to Whether Subsequent Secular Silent Gestures of Respect Violate the Establishment Clause Solely Because of a Discontinued Prior History of Prayer 16

A. This Court Has Never Held That a Subsequent Secular Government Practice Preceded by a Discontinued Religious History Violates the Establishment Clause. 16

B. The Third Circuit's Decision Conflicts With Circuit Court Decisions That Have Upheld the Constitutionality of Subsequent Secular Government Practices Even When Preceded by a Discontinued Religious Activity 20

II. The Third Circuit's Decision Conflicts With Decisions of This Court and Other Circuit Courts Because It Requires Public School Administrators, Teachers, Coaches, and Staff to Show Hostility to Student Religious Practices in Order to Avoid an Establishment Clause Violation 23

A. This Court's Decisions Hold That Under the Establishment Clause Public School Officials Cannot Show Hostility Towards Student Religious Activity 23

B. The Third Circuit's Decision Conflicts With Circuits That Have Recognized That Public School Officials Cannot Show Hostility to Religion in Public Schools 26

III. The Third Circuit Opinions and Conflicting Circuit Court Decisions Underscore the Pressing Need for Definitive Guidance From This Court Regarding the Obligations Under the Establishment Clause of Public School Educators When Responding to Student-Initiated Religious Activities 28

Conclusion 34

Appendix A:
Opinion of the United States Court of Appeals for the Third Circuit 1a

Appendix B:
Order of the United States District Court for the District of New Jersey 76a

Appendix C:
Excerpt from Transcript of Proceedings Before the United States District Court for the District of New Jersey 78a

Appendix D:
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing and Rehearing En Banc 88a

TABLE OF AUTHORITIES

CASES

ACLU v. Schundler,
168 F.3d 92 (3d Cir. 1999) 22

Ams. United for Separation of Church and State v. City of Grand Rapids,
980 F.2d 1538 (6th Cir. 1992) 29

Bd. of Ed. of the Westside Cmty. Sch. v. Mergens,
496 U.S. 226 (1990) 13, 24, 25, 26

Borden v. Sch. Dist. of the Twp. of E. Brunswick,
523 F.3d 153 (3d Cir. 2008) ..... *passim*

Child Evangelism Fellowship v. Montgomery County Pub. Sch.,
373 F.3d 589 (4th Cir. 2004) 27

Cutter v. Wilkinson,
544 U.S. 709 (2005) 23

Doe v. Duncanville Indep. Sch. Dist.,
70 F.3d 402 (5th Cir. 1995) 26, 27

Doe v. Small,
964 F. 2d 611 (7th Cir. 1992) 29

Edwards v. Aguillard,
482 U.S. 578 (1987) 17, 18

Freedom from Religion Found., Inc. v. City of Marshfield,
203 F. 3d 487 (7th Cir. 2000) 29

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) 32

Granzeier v. Middleton,
173 F.3d 568 (1999) 21

Kong v. City of San Francisco,
18 Fed. App'x. 616 (9th Cir. 2001) 29

Lee v. Weisman,
505 U.S. 577 (1992).....*passim*

Lynch v. Donnelly,
465 U.S. 668 (1984)..... 23

McCreary County v. ACLU,
545 U.S. 844 (2005).....18–19

Metzl v. Leininger,
57 F.3d 618 (7th Cir. 1995).....20, 21

Rusk v. Crestview Local Sch. Dist.,
379 F.3d 418 (6th Cir. 2004).....27, 29

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000).....*passim*

Zorach v. Clauson,
343 U.S. 306 (1952).....23, 24

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 2

STATUTES

28 U.S.C. § 1254(1).....1

OTHER AUTHORITIES

James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation,* 39 Akron L. Rev. 541 (2006) 31

John P. Martin, *School Coach Can Kneel While Players Pray,* The Star Ledger (Newark, N.J.), July 26, 2006 .. 7

Michael Stokes Paulson, *Religion and the Public School After Lee v. Weisman: Lemon is Dead,* 43 Case W. Res. 795 (1993) 31

Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test,* 86 Mich. L. Rev. 266 (1987) 31

PETITION FOR A WRIT OF CERTIORARI

Marcus A. Borden respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), and is reprinted as Appendix A, Pet. App. 1a–75a.

The court of appeals reversed the summary judgment order entered in petitioner's favor by the United States District Court for the District of New Jersey on July 25, 2006, reprinted as Appendix B, Pet. App. 76a–77a. That order incorporated oral findings of fact and conclusions of law made on the same date, which are reprinted as Appendix C, Pet. App. 78a–87a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Third Circuit entered its judgment and opinion on April 15, 2008, and denied petitioner's timely request for rehearing en banc on May 15, 2008. Justice Souter granted petitioner's applications to extend the time to file a petition for writ of certiorari, extending the deadline until October 10, 2008. Supreme Court Dkt. No. 07A1023. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion . . . .

STATEMENT OF THE CASE

A. Factual History

1. Petitioner Marcus A. Borden is a public school teacher and head football coach at East Brunswick High School ("EBHS") in East Brunswick, New Jersey, a position that he has held since 1983. He has received three national coaching awards, including recognition as the national high school football coach of the year. J.A. 437.[1] Respondents are the EBHS Board of Education, the EBHS School District, and the Superintendent of EBHS schools. J.A. 68.

For a number of years, Coach Borden and the EBHS football team engaged in two pre-game prayer traditions. Pet. App. 80a; J.A. 174–175. These traditions were started by Coach Borden's predecessor, sometime prior to 1983. Pet. App. 6a; J.A. 112–114. *First*, Borden joined in prayer before meals with his players, sometimes leading the prayer himself, at a pre-game private dinner in the

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[1] Unless otherwise noted, references to "J.A." are to the Joint Appendix filed before the court of appeals, and references to "R." are to docket entries before the district court.

school cafeteria. Pet. App. 6a; J.A. 110. *Second*, the players and coaches would "take a knee" together in the locker room immediately before each game. J.A. 106, 108, 441, 447–448. While taking a knee with his team, Borden would discuss tactics and strategies and rally his players for the game. Taking a knee is a part of football tradition in America. J.A. 108–109; 126–127. Following that discussion, Borden either joined in or led the team in prayer. J.A. 174–175.

2. In October 2005, Coach Borden stopped praying with his players at the direction of School District superintendent Jo Ann Magistro. J.A. 158–159. Borden then sought guidance as to what he could and could not do in response to the voluntary, student-initiated pre-game prayers. After neither Magistro nor the School District's counsel, Martin Pachman, could provide Borden with definitive guidance, respondents issued written guidelines that attempted to answer Borden's questions.

Respondents' guidelines stated that (i) students have "a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day"; (ii) students could pray before a meal in the cafeteria and hold a "prayer huddle" before a game; (iii) school representatives, including coaches, could not "encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time"; and (iv) school representatives could not "participate in student-initiated prayer." Pet. App. 9a–10a. The word "participate" was not defined, nor was any distinction drawn between active and passive

participation. The guidelines also failed to address the concrete questions Coach Borden had previously asked, such as: if his team began to pray voluntarily, must he leave the room? J.A. 439. Could he stand when the players stood to pray, or must he remain seated? J.A. 439. Shortly after the School District issued the guidelines, the EBHS Board of Education issued a public statement supporting Superintendent Magistro and further stating that "[w]e respect the rights of any employee to disagree with policies, procedures and legal interpretations, but cannot and will not tolerate violations of these rules by any employee of the district." Pet. App. 11a.

In light of the unclear guidelines, Borden believed that he was obligated to distance himself completely from his team's two traditional pre-game prayer activities for the remainder of the 2005 season. At the team's pre-game dinners, to avoid any appearance of participation, he remained motionless while the students prayed. J.A. 440–441. During the pre-game locker room strategy discussion he continued to take a knee, but stood up and remained motionless once the players initiated prayer. J.A. 441–442. The captain of the 2006 team, who was a player on the 2005 team, said that watching Borden respond to the 2005 team's pre-game prayers, was "awkward to watch," and hurtful to "team morale and team spirit." J.A. 169.

B. Procedural History

1. In November 2005, Borden filed suit against respondents in the Superior Court of New Jersey.

Pet. App. 14a. He sought a declaratory judgment that the school district's guidelines and the Board's statement violated his rights under the free speech, due process, and equal protection provisions of the New Jersey Constitution and federal Constitution. Coach Borden did *not* seek to pray or join with his players in pre-game prayers. Rather, he sought only to engage in two silent, respectful gestures: (i) to bow his head when students pray at the pre-game dinner, and (ii) to continue to "take a knee" with the team when they conclude the pre-game locker room meeting with a player-led prayer. Pet. App. 15a.

After respondents removed the case to federal district court, respondents moved for summary judgment, asserting that Borden's gestures of silent respect, if permitted, would violate the Establishment Clause. R. 15 at 16. Borden cross-moved for summary judgment, advancing his affirmative claims while asserting that his silent gestures would not violate the Establishment Clause. R. 16. In reply, respondents conceded (i) that there were no material facts in issue, J.A. 27, and (ii) that if respondents' Establishment Clause defense were rejected, then Borden would be entitled to summary judgment on all of his affirmative constitutional claims:

> [I]f this Court were to find [Borden's] actions do not implicate the Establishment Clause, then regardless of what constitutional right Plaintiff seeks relief under . . . he would be entitled to participate in voluntary, non-disruptive student prayers.

R. 20 at 46.

In July 2006, the district court granted Borden's cross-motion and denied respondents' motion. Pet. App. 78a–87a. The court relied on (i) Borden's representation that he was not seeking to join with or lead his players in pre-game prayers, J.A. 5; (ii) respondents' concession that there were no material facts in issue, J.A. 27; and (iii) respondents' concession that Borden had the constitutional right to engage in his silent gestures as long as they did not violate the Establishment Clause, R. 20 at 46.

Applying this Court's "endorsement" test, the district court held that Borden's secular gestures would not violate the Establishment Clause. *First*, the district court found that bowing one's head and taking a knee in football are not religious acts and, thus, rejected the argument that a reasonable observer would view Borden's secular actions as an endorsement of religion. Pet. App. 84a. *Second*, the court rejected Respondents' coercion concerns, holding that Borden's silent signs of respect could not have any coercive effect on students. Pet. App. 85a. *Finally*, the district court underscored the lack of clarity in the school's "guidelines":

> [W]e come down to what is considered participation. What is the coach to do? Should he leave the room? Turn his back? Stand at attention and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

> I don't think it's fair to ask a coach to do nothing. I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

Pet. App. 85a–86a. Having rejected respondents' Establishment Clause defense, the district court held, consistent with respondents' concession, that Borden's constitutional rights had been violated by the respondents' guidelines. Pet. App. 86a.

2. Respondents appealed to the Third Circuit.[2] Represented by new counsel, respondents reversed their legal positions and attempted to abandon their district court concession that Borden had valid constitutional rights to bow his head and take a knee. On appeal, respondents argued that Borden had no rights under the state and federal constitutions and, therefore, that it was not

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[2] Respondents made no efforts to stay the district court's declaratory judgment pending appeal. Shortly after the district court entered judgment against them, respondents stated that they were "pleased" by the decision. John P. Martin, *School Coach Can Kneel While Players Pray*, The Star Ledger (Newark, N.J.), July 26, 2006, at 1. Hence, during the 2006 and 2007 football seasons, Borden bowed his head in silent respect during player-led grace at pre-game meals, and remained on his knee at the conclusion of pre-game locker room meetings while his players voluntarily prayed.

necessary for the court of appeals to reach respondents' Establishment Clause affirmative defense, even though that was the only contested issue before the district court. Pet. C.A. Br. 30–32.

Judge Fisher's lead opinion allowed respondents, over Borden's objections, to retract their district court concessions and make new arguments challenging the validity of Borden's affirmative constitutional claims. Rather than remanding to the district court to address these new arguments, the lead opinion went on to decide the merits of Borden's affirmative constitutional claims in favor of respondents.

As to a number of Borden's affirmative constitutional claims, the court's holding was linked to and depended upon the interpretation of the Establishment Clause. Specifically, the court ruled that "the guidelines prohibiting [Borden] from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so." Pet. App. 41a. Likewise, the court concluded that "the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause." Pet. App. 41a–42a n.15. Indeed, the court rejected Coach Borden's due process claim based on its conclusion that "Borden has no interest—privacy, liberty, or otherwise—in behavior that violates the Establishment Clause." Pet. App. 43a. As such, the court concluded that its interpretation of the Establish-

ment Clause was "necessary" to its ultimate resolution of the case. Pet. App. 45 n.17.

Two of the Third Circuit judges concluded that Coach Borden's silent gestures would violate the Establishment Clause. Pet. App. 5a. They discounted that Coach Borden had not only stopped praying with his players in October 2005, but had also represented that he no longer sought to pray with his players. The lead opinion solely relied upon "Borden's twenty-three years of prior prayer activities[,]" Pet. App. 5a, to support the conclusion that a reasonable observer would construe Borden's silent acts of respect to be an impermissible endorsement of religion regardless of his actual intent. Pet. App. 48a–54a. However, in doing so, it was acknowledged that (i) Borden's two silent gestures of respect, standing alone, were not religious acts; and (ii) were it not for Borden's discontinued prayerful history, his silent gestures of respect would be permitted under the Establishment Clause:

> We agree with Borden that bowing one's head and taking a knee can be signs of respect. Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion[.]

Pet. App. 55a.

Judge McKee's concurring opinion, agreed that Coach Borden's silence during player-initiated

prayers violated the Establishment Clause, but disagreed with the statement that there would likely be a different outcome if there had been no history of Borden's prior participation in student prayer. Pet. App. 57a. According to Judge McKee, a reasonable observer "could interpret Borden's proposed actions as an endorsement of religion even absent the coach's history of promoting team prayer[.]" Pet. App. 58a. Judge McKee then further rejected the lead opinion's Establishment Clause analysis by suggesting that the 2006 team's student-led prayers were actually the result of indirect coercion. Pet. App. 60a–70a.

Judge Barry's separate concurring opinion was sharply critical of the majority in three respects. *First*, she would not have allowed respondents to transform the "legal landscape" by going back on "their word" to Coach Borden and the district judge:

> Given my druthers, I would hold defendants to their word and would not entertain, as my distinguished colleagues have so generously entertained, the new issues and arguments raised on this appeal.

Pet. App. 71a–72a. *Second*, Judge Barry disagreed with Judge Fisher's and Judge McKee's application of the endorsement test. She wrote that she would have held Borden's gestures of silent respect did not violate the Establishment Clause:

> Thus, if and when in the future a player decides to initiate prayer, the reasonable observer would know, given Borden's repre-

> sentations, that he did not ask for a prayer; did not select someone to say a prayer; did not monitor the content of the prayer; did not provide a means for broadcasting the prayer; did not join his hands with anyone; and did not mouth the words of the prayer, or say it aloud, or otherwise do anything to put the imprint of the state on the prayer. A reasonable observer would simply see Borden bow his head or take a knee in a silent, unobtrusive sign of respect for the private choices made by individual players who are constitutionally permitted to choose to engage in religious activities.

Pet. App. 73a–74a. *Third*, Judge Barry criticized the religiously hostile consequences of the lead opinion's holding:

> Judge Fisher "would likely" find, as would I, *no* endorsement of religion were a football coach, who had never engaged in prayer with his team, to bow his head or take a knee while his team engaged in a moment of reflection or prayer. *Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer* but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk away.[] Any such requirement would evidence a hostility to religion that no one would intend.

Pet. App. 74a–75a (emphasis added, footnote omitted).

The court of appeals denied Coach Borden's petition for panel rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

Sixteen years ago this Court held that a public school's official sponsorship of a clergy member's invocation and benediction at a graduation ceremony violated the Establishment Clause. The Court, however, was careful to say that the Establishment Clause permits religious practices in public schools. *Lee v. Weisman*, 505 U.S. 577, 599 (1992). Eight years later, this Court again invalidated a public school's sponsorship of religious activity but also again was careful to say that student religious acts in public schools, such as student prayer, are permitted by the Establishment Clause. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000). As Justice Kennedy wrote in *Lee:* "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that . . . *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. . . . But these matters, often questions of accommodation of religion, are not before us.*" 505 U.S. at 598–599 (citations omitted, emphasis added). In the intervening years, this Court, the lower courts, and public school educators have struggled to resolve exactly how constitutionally protected

student "religious values" and "religious practices" must be responded to by public school educators "throughout the course of the educational process." *Id.* at 599. Unfortunately, when lower courts have examined these inevitable interactions between public school educators and students through the lens of the Court's Establishment Clause jurisprudence, the conflicting results have engendered more confusion than clarity.

This case epitomizes the confusion among all persons involved with public school education and highlights the pressing need for guidance from this Court. Here, a group of high school football players voluntarily chose to follow tradition and engage in a team prayer before every football game. Their coach, Marcus Borden, does not seek to pray with them. He neither encourages nor condemns their choice to engage in student-initiated prayer. He seeks to do no more than to show respect for their religious activity. Yet when Coach Borden asked for guidance, respondents told him only that he could not "participate" in the prayer. When Coach Borden turned to the courts for clarity, four judges have given him four different opinions about the requirements of the Establishment Clause.

Coach Borden's dilemma is pervasive in our public schools. Every public school administrator, teacher, coach and staff member throughout the nation inevitably must, from time to time, respond to constitutionally protected student religious practices that are expressly allowed by this Court's decisions in *Lee, Santa Fe,* and *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S.

226 (1990). Students may, for example, want to pray in their homerooms at the start of a school day, in a cafeteria before meals, before sporting events, at memorial services, or at student club activities. J.A. 247–282. These hundreds of thousands of public school educators must, therefore, regularly confront the question expressly left open in *Lee* and not addressed in *Santa Fe:* How should they respond when confronted with student-initiated constitutionally protected religious exercise? Through its opinions below, the Third Circuit has caused further confusion, shown improper hostility to constitutionally protected private religious exercise, and generated conflict with decisions of this Court and other federal courts of appeals.

First, in conflict with the decisions of this Court and several courts of appeals, the decision below held that Coach Borden's non-religious acts of silent respect violated the Establishment Clause solely because he previously had prayed with his players. This Court, however, has never found an Establishment Clause violation solely based on discontinued prior religious practices. Such a holding is contrary to decisions by other federal circuit courts and is tantamount to permanently branding certain public school educators with a scarlet letter, treating them as Establishment Clause violators even after they have stopped joining in student-initiated prayer.

Second, the Third Circuit's decision forces Borden to engage in conduct that is overtly hostile to his players' voluntary religious acts. Under the ruling below, it is not enough that Coach Borden

merely stop joining with his players in pre-game prayers. Instead, Coach Borden must sequester himself from his team, under threat of insubordination, whenever his players voluntarily pray. As such, the Third Circuit's decision runs afoul of this Court's repeated instructions that the Constitution requires government to respect religion and forbids government hostility to religion. Rather than preventing a constitutional violation, the decision below anomalously requires state actors to violate the Establishment Clause.

This case provides an ideal vehicle for this Court to restore government neutrality to religion in public schools, to clarify Establishment Clause jurisprudential issues that have confused and engendered conflict among the lower courts, to answer the question left open in *Lee* and *Santa Fe*, and to provide much-needed guidance to public school teachers, coaches, staff, and administrators who seek to understand what the Establishment Clause permits and prohibits on those many occasions when they must inevitably respond to the protected religious practices of public school students. The petition for certiorari should be granted.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AS TO WHETHER SUBSEQUENT SECULAR SILENT GESTURES OF RESPECT VIOLATE THE ESTABLISHMENT CLAUSE SOLELY BECAUSE OF A DISCONTINUED PRIOR HISTORY OF PRAYER.

The Third Circuit's decision creates an inflexible and unreasonable rule: once an Establishment Clause violator, always an Establishment Clause violator. The Third Circuit held that *even though* Coach Borden had stopped praying with his players, and *even though* his requested acts of silent respect were, standing alone, appropriate under the Establishment Clause, Coach Borden's non-religious conduct nevertheless violated the Establishment Clause because of a history of prayerful activities that ended two and a half years before the Third Circuit decision. Such a holding is inconsistent with this Court's analysis of such history when addressing Establishment Clause claims and contradicts the holdings of several federal courts of appeals.

A. This Court Has Never Held That a Subsequent Secular Government Practice Preceded By A Discontinued Religious History Violates the Establishment Clause.

Though history has long played a role in application of the endorsement test's "reasonable

observer" standard, this Court has never relied on history alone to invalidate a secular act by a state actor. To the contrary, the Court has relied on a history of prior religious activity for two narrow reasons: (i) to corroborate the unconstitutional religious purpose of a government act, or (ii) to expose a proffered secular purpose as a "sham."

For example, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), this Court invalidated a school district's practice of having a student read a prayer over the loudspeaker prior to school football games. Though the school's policy regarding "pre-game ceremonies" at football games had evolved over time, the Court stressed that its inquiry was focused solely on the validity of the most current version of the policy. *Id.* at 297–298. Only *after* concluding that the current policy was facially unconstitutional did the Court turn its attention to other corroborating factors, one of which was the policy's religious history. *Id.* at 307. Using history to corroborate its decision, the Court concluded that the school district's stated secular justifications for the current policy were shams, designed to conceal its true intent to continue the district's historical involvement in religious activity. *Id.* at 308–309.

This Court similarly made a limited use of history in *Edwards v. Aguillard*, 482 U.S. 578 (1987), when it invalidated a Louisiana statute that forbade the teaching of evolution in public schools. Though the state argued that the statute was supported by a secular purpose, the Court concluded that the proffered secular purpose was not furthered by the statute's text. *Id.* at 586–587. The Court

then relied on the statute's history to corroborate that advocacy for "creation science" was actually intended to be a religious act, and therefore that the statute violated the Establishment Clause. *Id.* at 591–592.

Both *Santa Fe* and *Edwards* used religious history to corroborate an independent determination that challenged government practices violated the Establishment Clause because they had a religious character. By contrast, a majority of the panel below agreed that Coach Borden's silent acts of respect, standing alone, were *not* religious in character nor was there any suggestion that Coach Borden's stated secular purposes are "shams." Pet. App. 54a–55a; 72a–75a. Nevertheless, Coach Borden's non-religious acts were held to violate the Establishment Clause solely because of his prior history of prayerful activities with his players. Pet. App. 53a–54a, 70a–72a. In so holding, the Third Circuit opinion rewrites the words of the Establishment Clause to prohibit not only government establishment of religion but also conduct that does nothing more than reflect government respect for religion.

This Court has never held that a state actor is obligated to show hostility for private religious activity because that actor previously engaged in religious activity that has been deemed to violate the Establishment Clause. To the contrary, the Court has rejected the notion that religious history is outcome-determinative under the Establishment Clause, or that past religious conduct "forever taint[s]" all future acts dealing with the same subject matter. *McCreary County v. ACLU*, 545 U.S. 844,

873–874 (2005). Where, as here, a challenged practice has been found to be non-religious, this Court's precedent precludes using religious history to transform a secular act into an Establishment Clause violation. The decision below thus conflicts with this Court's jurisprudence.

The Third Circuit's Establishment Clause ruling is central to the outcome of this case. In the ruling below, Coach Borden's affirmative claims were resolved by the Third Circuit based on its interpretation and analysis of the requirements of the Establishment Clause. *See* Pet. App. 40a–41a (freedom of association claim); *id.* at 41a–42a n.15 (expressive association claim); *id.* at 42a–43a (due process claim). Indeed, the Third Circuit recognized that its analysis of petitioner's claims made it "necessary" to decide the Establishment Clause issue. *See* Pet. App. 45a n.17. Thus, the Third Circuit's Establishment Clause holding is an essential basis for the judgment below. As such, this case is an appropriate vehicle for deciding the question presented.

B. The Third Circuit's Decision Conflicts With Circuit Court Decisions That Have Upheld The Constitutionality Of Subsequent Secular Government Practices Even When Preceded By A Discontinued Religious Activity.

The Third Circuit's opinion directly contradicts decisions of several other federal courts of appeals which have refused to treat subsequent secular government acts as Establishment Clause violations merely because of a discontinued prior religious history.

For example, in a series of cases reviewing "Good Friday" closing laws, the Sixth and Seventh Circuits have held that subsequent secular government practices preceded by a discontinued religious history do not violate the Establishment Clause. First, in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit considered the constitutionality of a state law mandating that Good Friday be treated as a school holiday. The court of appeals invalidated the practice, finding that the law's "purpose was to encourage Christian religious observances." *Id.* at 620–621. But in doing so, the court expressly noted that the state could continue the same practice in the future by adopting a secular justification:

> [W]e have left open the possibility that Illinois can accomplish much the same thing either by officially adopting a "spring weekend" rationale for the law, in place of

> the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts.

Id. at 623–624. By doing so, the Seventh Circuit rejected any argument that the state's history of religiously motivated Good Friday closings would preclude enactment of a subsequent similar-but-secular school closing statute.

In *Granzeier v. Middleton*, 173 F.3d 568 (1999), the Sixth Circuit took *Metzl* to its logical conclusion. The *Granzeier* court considered a challenge to a Kentucky county's practice of closing county and state courts and offices on Good Friday. *Id.* at 571. In 1995, a court employee announced the closure with "signs bearing an image of the Crucifixion"—signs which all parties agreed were unconstitutional. *Id.* at 571–573. But in spite of this religious history, the Sixth Circuit rejected the argument that the signs "irrevocably established an endorsement of religion, from which Defendants cannot retreat." *Id.* at 574. The court held that the closing practice was supported by secular purposes, and thus would not have the effect of establishing religion despite its blatant religious history. *Id.* at 574–576. It concluded that "future closings will not make a reasonable person think the defendants were endorsing religion," even though the prior religious history "could make a reasonable observer think that Defendants endorsed the Christian religion." *Id.* at 576. In doing so, the Sixth Circuit refused to allow religious history to transform non-religious conduct into an Establishment Clause violation.

A prior panel of the Third Circuit also recognized that religious history could not serve to invalidate subsequent similar secular acts by government actors. In *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), the court of appeals considered a challenge to a Jersey City "holiday display." The display was a modified version of a display previously struck down by the Third Circuit. The Third Circuit rejected the argument that the religious history of the display created a permanent "unconstitutional taint" that required the new display's automatic invalidation. 168 F.3d at 105. Writing for the Court, then-Judge Alito concluded:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (internal citations omitted).

In all three of these cases, the courts of appeals recognized that a subsequent secular government practice preceded by a religious history does not violate the Establishment Clause. Accordingly, the decision below conflicts with these circuit decisions.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS BECAUSE IT REQUIRES PUBLIC SCHOOL ADMINISTRATORS, TEACHERS, COACHES, AND STAFF TO SHOW HOSTILITY TO STUDENT RELIGIOUS PRACTICES IN ORDER TO AVOID AN ESTABLISHMENT CLAUSE VIOLATION.

In *Lynch v. Donnelly*, this Court recognized that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." 465 U.S. 668, 673 (1984); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (recognizing that government action respecting and accommodating religion does not violate the constitution). By enjoining Coach Borden from showing respect for his players voluntary prayer acts, the decision below requires public school educators to violate the Establishment Clause by showing disrespect and hostility towards student-initiated religious practices.

A. This Court's Decisions Hold That Under the Establishment Clause Public School Officials Cannot Show Hostility Towards Student Religious Activity.

As Justice Douglas noted in *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court has long recognized that public schools and religion should not be "aliens to each other" nor should they be "hostile, suspicious,

and even unfriendly." *Id.* at 312. Rather, government neutrality towards religion, especially in the public school context, remains a cornerstone of the Establishment Clause. *Id.* at 314 (upholding public school program that "respects the religious nature of our people and accommodates the public service to their spiritual needs").

Decades later, these principles were echoed by both concurring and dissenting opinions in *Lee v. Weisman*, which reiterate that the Establishment Clause requires that the government must respect and accommodate religious activity in public schools. *See* 505 U.S. at 627–629 (Souter, J., concurring) (stating that government respect for religion is evidence of neutrality towards, not endorsement of, religion); *id.* at 637 (Scalia, J., dissenting) (stating that "fostering respect for religion generally" trumps even the government interest in avoiding "the false appearance of participation"). The decision below thus conflicts with this Court's consensus of opinion that the Establishment Clause requires state actors to respect religion.

This Court's opinions in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), provide an example of how a school district's zeal to achieve religious "neutrality" can result, as here, in religious hostility violative of the Establishment Clause. Under the Equal Access Act, public secondary schools who allow non-academic student groups to meet on school property are "prohibited from discriminating against students who wish to conduct a meeting . . . on the basis of the 'religious, political, philosophical, or other content of

the speech at such meetings.'" *Id.* at 235. After the Westside school system refused to accommodate a student's request to form a Christian club, it defended its actions on the grounds that the Equal Access Act violated the Establishment Clause. *Id.* at 249–250. Writing for a plurality, Justice O'Connor stressed that even though the Act provided "incidental benefits" to religious groups, this alone did not amount to an establishment of religion. *Id.* at 248. Rather, allowing religious groups equal access evidenced neutrality, while refusing to do so "would demonstrate not neutrality but hostility towards religion." *Id.* A modicum of respect by the school system was thus required in order to avoid violating the Constitution.

Justice Kennedy, joined by Justice Scalia, concurred separately to stress the concern that application of the Establishment Clause's "endorsement" test could, as here, require state actors to violate the Establishment Clause by showing hostility to religion:

> The plurality uses a different test, one which asks whether school officials, by complying with the Act, have endorsed religion. It is true that when government gives impermissible assistance to a religion it can be said to have "endorsed" religion; but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. And for reasons I have explained elsewhere, *its literal application may result in neutrality in name but hostility in fact when the question is the government's*

> *proper relation to those who express some religious preference.*

Id. at 261 (Kennedy, J., concurring) (emphasis added).

Such concern is particularly apt in this case. Here, the Third Circuit's decision requires Coach Borden to distance himself physically from his team's religious acts, clearly signaling hostility towards the students' constitutionally protected religious expression. J.A. 169–170. If left unreviewed by this Court, the Third Circuit decision will cause Coach Borden to violate the Establishment Clause every time his players voluntarily choose to say a pre-game prayer.

B. The Third Circuit's Decision Conflicts With Circuits That Have Recognized That Public School Officials Cannot Show Hostility To Religion in Public Schools.

The Third Circuit's decision conflicts with decisions in the Fourth, Fifth, and Sixth Circuits, all of which have stressed that the Establishment Clause forbids public schools from exhibiting hostility towards voluntary acts of student-initiated religious activity.

In *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit concluded that "neither the Establishment Clause nor the district court's order prevent [school] employees from treating students' religious beliefs and practices with deference and respect; indeed, the

constitution *requires* this. Nothing compels [school] employees to make their non-participation vehemently obvious or to leave the room when students pray[.]" *Id.* at 406. By contrast, the Third Circuit's decision requires Coach Borden to engage in vehement non-participation every time his players pray. This reality was recognized by the district court and Judge Barry's concurrence, as well as confirmed in actual practice by Borden and his players during the 2005 season. J.A. 169; Pet. App. 85a; Pet. App. 74a–75a & n.34.

The Fourth and Sixth Circuits have similarly stressed that when neutrality is not maintained the Establishment Clause is violated. In *Child Evangelism Fellowship v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004), the Fourth Circuit rejected a school district's argument that it would violate the Establishment Clause if it allowed a school religious club to circulate "take-home flyers" to students. *Id.* at 592. In rejecting the school district's Establishment Clause concerns, the court of appeals recognized that any danger that a reasonable observer would perceive the school's actions as an endorsement of religion was no greater than the likelihood that students would perceive the school as being hostile towards religion if distribution of the club's flyers were not allowed. *Id.* at 595–596. The Sixth Circuit followed suit in *Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004), which also rejected Establishment Clause concerns about a flyer distribution program on the grounds that denying access to religious groups would constitute hostility, not neutrality, towards protected religious activity. *Id.* at 422–423.

The Third Circuit's analysis of the Establishment Clause was a necessary part of its rejection of Coach Borden's affirmative claims. Enjoined by the Third Circuit from showing silent respect for his student's voluntary prayer activities, Coach Borden must now affirmatively distance himself from their religious acts. Such "vehement" disrespect and hostility for religion, mandated by the Third Circuit's decision, conflicts with decisions of the Fourth, Fifth and Sixth Circuits.

III. THE THIRD CIRCUIT OPINIONS AND CONFLICTING CIRCUIT COURT DECISIONS UNDERSCORE THE PRESSING NEED FOR DEFINITIVE GUIDANCE FROM THIS COURT REGARDING THE OBLIGATIONS UNDER THE ESTABLISHMENT CLAUSE OF PUBLIC SCHOOL EDUCATORS WHEN RESPONDING TO STUDENT-INITIATED RELIGIOUS ACTIVITIES.

The Third Circuit's array of opinions and conflicting circuit court decisions illustrate the well-documented problems that lower courts and public school educators regularly face when deciding how they may constitutionally respond to student-initiated religious activities. Many of these problems stem from the "endorsement test," an analytic framework criticized by members of this Court, lower courts, and legal commentators.

The circuits have long been uncertain of the appropriate amount of contextual or historical

knowledge to assign to the endorsement test's hypothetical reasonable observer. *See, e.g., Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F. 3d 487, 495 n.2 (7th Cir. 2000) (noting "the unresolved dispute which exists within various circuits and within the Supreme Court as to the proper level of understanding to impute onto our mythical reasonable observer"). Lacking clear guidance, they have settled on a wide range of different possibilities when applying the endorsement test. *See e.g., Rusk*, 379 F.3d at 420–421 (in school endorsement case, using reasonable and knowledgeable parent as baseline rather than student); *Marshfield*, 203 F. 3d at 494 (considering viewpoint of "reasonable but unknowledgeable observer") *Kong v. City of San Francisco*, 18 Fed. App'x. 616, 617 (9th Cir. 2001) (same); *Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543–1544, 1557–1558 (6th Cir. 1992) (Lively J., dissenting) (disputing proper degree of local knowledge to impute to reasonable observer); *Doe v. Small*, 964 F. 2d 611, 629–630 (7th Cir. 1992) (Easterbrook J., concurring) (viewpoint of "obtuse observer" who mistakenly believes that "the government endorses what it does not forbid" cannot create a constitutional violation).

The inconsistent opinions below highlight the judicial confusion engendered by the "endorsement test," especially in the context of public schools. Judge Fisher's lead opinion purported to rely upon a "reasonable observer" imbued only with historical knowledge:

> [W]e must consider whether a reasonable observer would perceive [Borden's] actions as endorsing religion, not whether Borden intends to endorse religion. A reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer. Based on this history, we hold that a reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion.

Pet. App. 53a–54a (footnotes omitted). On the other hand, Judge Barry relied upon a "reasonable observer" invested with a perspective that was far more comprehensive and contextual:

> [A] reasonable observer would not only have knowledge of [Borden's] history, but would know of all that has taken place leading up to and during this litigation and know that Borden, under oath, has represented what he will and will not do and that he merely wishes to show respect for his players when they pray. A reasonable observer would have no reason to believe that Borden was lying.

Pet. App. 73a. Thus, though Judge Fisher and Judge Barry both agreed that a "reasonable observer"

served as the correct benchmark, they came to opposite conclusions—one concluding Borden's gestures violated the Establishment Clause and the other concluding no violation.

Legal commentators have similarly noted flaws in the endorsement test because it is "driven by ambiguities and analytical flaws" that render the test "ineffectual as a doctrinal tool." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test,* 86 Mich. L. Rev. 266, 300 (1987); *see also id.* ("Because the test is composed of unmanageable or fatally ambiguous concepts, it cannot provide the needed predictability or guidance for lower courts and governmental entities."). As one commentator explains, the test's primary flaw is that it is "all subjective line-drawing. The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge's largely subjective impressions." Michael Stokes Paulson, *Religion and the Public School After Lee v. Weisman: Lemon is Dead,* 43 Case W. Res. 795, 815 (1993). The endorsement test's reliance on vast judicial discretion has yielded inconsistent results. *See* James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation,* 39 Akron L. Rev. 541, 555–556 (2006).

If the endorsement test cannot be consistently applied throughout the lower courts, as reflected in the four different judicial opinions Borden has gotten, then public school teachers, coaches,

administrators, and staff cannot realistically be expected to know, or even predict, whether their conduct violates the Establishment Clause. Here, it was only petitioner's religious history .that caused the Third Circuit to render unconstitutional his acts of respectful silence in response to his players' prayers. Yet it is equally reasonable that, under the endorsement test, petitioner's retreat from his religious history reasonably signaled a conscious and effective effort to comply with the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) ("[E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say that the danger that children would misperceive the endorsement of religion as any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded"). Further, the Third Circuit's lead opinion creates a regime in which Coach Borden's exact actions, if engaged in by another coach in the same school, would be wholly permissible—making consistent interpretation and application of the Establishment Clause impossible even within the same school

Although the endorsement test was designed to ensure consistency of outcomes among the courts when assessing factually similar situations, the test has become an unworkable vehicle by which judges impose their subjective impressions and personal perspectives. The result is court decisions that blur the line between permitted government accommodation and prohibited government establishment of religion, thereby compounding rather than eliminating the guessing that public

educators must daily make about the boundaries of the Establishment Clause. This Court's intervention is therefore necessary to provide guidance to lower courts and public school educators who not only are required, but genuinely want, to ensure that their conduct conforms to the requirements of the Establishment Clause.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 10, 2008

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3890

MARCUS A. BORDEN,
Appellee

v.

SCHOOL DISTRICT OF THE
TOWNSHIP OF EAST BRUNSWICK;
BOARD OF EDUCATION OF THE
TOWNSHIP OF EAST BRUNSWICK;
Dr. JO ANN MAGISTRO, In Her Capacity As
Superintendent, School District Of The
Township Of East Brunswick,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 05-cv-05923)
District Judge: Honorable Dennis M. Cavanaugh

Argued October 3, 2007
Before: McKEE, BARRY and FISHER,
Circuit Judges.

(Filed: April 15, 2008)

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OPINION OF THE COURT

FISHER, Circuit Judge.

Marcus Borden, the head football coach at East Brunswick High School, would like to engage in the silent acts of bowing his head during his team's pre-meal grace and taking a knee with his team during a locker-room prayer. He brought suit seeking a declaratory judgment that the East Brunswick School District's policy prohibiting faculty participation in student-initiated prayer was unconstitutionally overbroad and vague, and violated his federal and state constitutional rights to freedom

of speech, academic freedom, freedom of association, and due process. On cross-motions for summary judgment, the District Court for the District of New Jersey declared the policy unconstitutional on all grounds, and it additionally held that Borden's silent acts would not violate the Establishment Clause of the First Amendment. However, we hold that the policy is not unconstitutional on its face or as applied to Borden. Additionally, we hold that Borden's silent acts violate the Establishment Clause because, when viewing the acts in light of Borden's twenty-three years of prior prayer activities with the East Brunswick High School football team during which he organized, participated in, and even led prayer activities with his team, a reasonable observer would conclude that Borden was endorsing religion when he engaged in these acts. Therefore, and for the reasons set forth in further detail below, we will reverse the District Court's order.

I.

A. Factual History

1. 1983-2005 (Pre-litigation)

Marcus Borden is the head football coach at East Brunswick High School ("EBHS"), and he has

held that position since 1983.[1] During his tenure at EBHS, Borden engaged in two pre-game prayer activities that occurred (1) at the team dinner; and (2) while taking a knee in the locker room.

As part of the pre-game activities for the EBHS football team, the team ate a pasta dinner together at approximately 3:00 p.m. on game day in the high school cafeteria. In addition to the team, parents and other guests, including the cheerleading squad, were present. Prior to the time Borden coached the team to 1997, a local minister, Reverend Smith, said a pre-meal prayer. However, in 1997, the athletic director told Borden that Reverend Smith could not continue to say the prayer. Instead, Reverend Smith wrote a prayer that the students took turns reading. Then, in 2003, Reverend Smith retired, and Borden did not continue to have the students read Reverend Smith's prayer. Borden instead began a new tradition: he said the prayer prior to the first pre-game dinner of the 2003, 2004, and 2005 seasons. For the subsequent weeks of those seasons, Borden asked those attending the dinner to "please stand," and chose a senior player to say a prayer.

In addition to the prayer before the team dinner, Borden led his team in a prayer immediately before the game. Prior to taking the field, Borden and his assistant coaches asked the players to take a knee in the locker room. The team gathered in front of the

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[1] Borden is also a tenured teacher of Spanish at EBHS.

chalkboard or dry erase board on one knee, and at that time, Borden discussed the tactics and strategy for that particular game. Following that discussion, Borden led the team in a prayer. Borden described an example of the prayer he said as follows:

> "[D]ear lord, please guide us today in our quest in our game, our championship. Give us the courage and determination that we would need to come out successful. Please let us represent our families and our community well. Lastly, please guide our players and opponents so that they can come out of this game unscathed, [and] no one is hurt."

The team participated in this tradition for twenty-three seasons, beginning when Borden became the coach of the EBHS football team in 1983 and continuing until the 2005 football season.

On September 26, 2005, Jo Ann Magistro, the Superintendent of the East Brunswick School District ("School District"), received a complaint from a parent about the prayer at the team dinner. The parent told Magistro that she thought it was inappropriate that Borden requested that everyone stand for the prayer and that he bowed his head during the prayer. Over the course of that week, two other parents complained to Magistro about the prayer. One of the complaining parents had a son on the team, and the parent told Magistro that her son felt uncomfortable during the prayer and feared that the coach would select him to say the prayer.

Although Magistro did not contact Borden herself, the EBHS principal and athletic director contacted Borden about these complaints. They told him not to lead the team in prayer, and he responded that he did not lead them in prayer. At the team dinner on September 30, 2005, he continued the prayer traditions in the manner described above. It was alleged that he told the students that if they felt uncomfortable during the prayer, they could wait in the restroom until it was over. Following that game, Magistro received several more complaints.

On October 6, 2005, the School District's counsel, Martin Pachman, advised Magistro and the East Brunswick Board of Education ("Board") regarding Borden's conduct, stating that a coach for the school could not lead, encourage, or participate in student prayer. Magistro met with Borden the next day, October 7, 2005, and told him that all prayer needed to be student initiated, including the selection of which student would recite the prayer. At that time, Borden asked her if he could continue to say the pre-game prayer in the locker room. In response, Magistro contacted Pachman, who answered Borden's questions. At the end of the conversation, Magistro asked Pachman to provide clear guidelines on faculty participation in student prayer.

Later that day, Magistro sent Borden a memorandum and attached the guidelines provided by Pachman. Magistro stated that she recognized Borden's disappointment, but she expected him to comply with the guidelines, and "[n]ot to comply will be viewed as insubordination." The attached

guidelines, which stated that they were not "exhaustive or final," were as follows:

> "1. Students have a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day, provided that:
>
> A. The activity is truly student initiated; and
>
> B. The prayer activity does not interfere with the normal operations of the school district.
>
> This would mean that, for example, if a student or a group of students wish to engage in a prayer before or after their meal in the cafeteria during their lunch period they would have a right to do so, provided that the activity in which they are engaged does not disrupt the normal operation and decorum of the other students eating in the cafeteria. Also, if student athletes on their own decide to hold a prayer huddle before a game, after a game, or during half-time, they have a right to do so.
>
> 2. Neither the school district nor any representative of the school district (teacher, coach, administrator, board member, etc.) may constitutionally encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-

> sponsored setting, including classes, practices, pep rallies, team meetings, or athletic events.
>
> 3. Representatives of the school district, as referenced above, cannot participate in student-initiated prayer. That very issue was decided by the Fifth Circuit Court of Appeals in a decision cited with approval by the United States Supreme Court and is, therefore, the operative law of the land at this time. To quote the Court, 'If while acting in their official capacities (school district) employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion,' and such conduct was prohibited?"[2]

That same evening, Borden resigned, effective immediately, and he did not attend the football game scheduled for that evening. However, on October 17, 2005, Borden withdrew his resignation and agreed to abide by the School District's policy for the remainder of the 2005 season.

The Board held a meeting on October 20, 2005. Michael Baker, the president of the Board, read a

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[2] A similar memorandum was sent out to the entire staff on October 10.

prepared statement ("the Board's statement"). In full, it read:

> "I want to take this opportunity on behalf of the Board of Education, to make some remarks regarding the events that have transpired with our football coach: First and foremost, Dr. Magistro has acted professionally, appropriately and respectfully. She has represented the district and the Board of Education with dignity and class. We sincerely thank her and appreciate the way she has conducted herself. We have instructed Dr. Magistro to get on with running the district and to defer any continuing distractions in this matter to our attorney, Mr. Pachman[,] or to the Board of Education.
>
> Coach Borden, after reconsidering his decision, has rescinded his resignation and continues as coach of the team. He will conduct himself in a manner that is in compliance with the law. We do not believe that there was any deliberate attempt or motive from him to do otherwise. We respect the rights of any employee to disagree with policies, procedures and legal interpretations, but cannot and will not tolerate violations of these rules by any employee of the district. Each of us up here, are elected to serve this community and take an oath of office to respect and defend the Constitution of the United States and there is no ambiguity or gray area for us in

understanding this oath. We will, whenever confronted, follow the laws of our land regardless of personal views or interpretations of these laws. Our employees will do the same. It is our uncompromising expectation that Coach Borden' s personal agenda along with his lawyer[']s, does not in any way interfere with this school district.

The Board of Education will continue to see that our schools run at the highest of standards and with complete respect for the law and for the rights of all of our students and staff. Any comments that come from sources other than the Board of Education, our counsel or the Superintendent are not official and therefore not necessarily representative of our position.

We are a divided nation and have been since the ratification of our Constitution in 1791. Issues of faith are personal and divisive today as they were back then. This meeting and subsequent [Board of Education] meetings are not the forum for such debate, and legal [c]onstitutional rulings are not the purview of the Board of Education. Congress, the President and the Supreme Court[] make, enforce and interpret the laws and these branches of [g]overnment are the appropriate places to lobby for one's position on these matters, not here. This is not a platform for individual agendas on [c]onstitutional cases that have already been clearly decided. I will therefore preside over

> this meeting this evening with these thoughts in mind.
>
> One of the foundations of our democracy is that the right of someone to express concern or to bring a matter of discomfort to the attention of authority is to be respected and protected. It is not to be vilified and dishonored. Some of the extreme language, hateful emails and inappropriate and inaccurate reporting of this story, has shifted blame onto the blameless and has distorted beyond measure the matter at hand. If we can do one thing together as a community, it should be to stand up in vast numbers and express outrage and concern against those who would cheapen the actions of brave and committed Americans. No person should have to be afraid to express their constitutionally protected individual rights. Hopefully, we can all learn from this experience and move forward with dignity and respect for each other. Thank you."[3]

Following the issuance of the October 7 guidelines and the Board's statement on October 20, Borden conducted himself in accordance with the School

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[3] Following the media hype created by this case, EBHS student internet message boards were bombarded with posts, several of which included derogatory comments based on religion and race.

District's new policy for the balance of the school year, notwithstanding the litigation he instituted on November 21, 2005.

2. 2006-Present

Prior to the 2006 football season, Borden sent an email to Sergio Garcia and Randall Nixon, the co-captains of the team for the 2006 season, requesting that they ask the players whether they would like to continue the tradition of praying at the team dinner and prior to the game. In his email request, he told the co-captains that "[w]hatever the players decide to do is fine with me." He asked the captains to pass on the players' response and to ensure him that they spoke with all of the players on the team. Nixon's response indicated that the players voted to continue both the pre-meal and pre-game prayer. Following the grant of summary judgment in his favor in this case, Borden stood and bowed his head during the prayer before the meal, and remained on one knee during the pre-game prayer.

B. Procedural History

On November 21, 2005, Borden instituted this litigation against the School District, the Board of Education, and Magistro in her capacity as Superintendent (collectively, "the defendants") in the Superior Court of New Jersey. The defendants removed the suit to the United States District Court for the District of New Jersey on December 22, 2005. Rather than seeking to continue to do what he had done for the previous twenty-three years, Borden sought "to show his respect for his

players, respect for The Team Prayers, and respect for East Brunswick's football tradition by engaging in two silent acts during The Team Prayers: (i) bowing his head during grace; and (ii) taking a knee with his team in the locker room." His complaint alleged that the guidelines and the Board's statement prevented him from undertaking either of these activities.

Borden's complaint presented two causes of action. Under Count 1, Borden alleged that the defendants violated his rights as embodied in Articles 1, 4, 6 and 18 of the New Jersey Constitution.[4] Count 2 alleged that the defendants violated his Due Process and Equal Protection rights under the Fourteenth Amendment of the United States Constitution. For both of these counts, Borden sought the same relief: (1) a declaratory judgment stating that the guidelines issued on October 7 and the Board's statement on October 20 were unconstitutional based on the respective constitutional provisions; (2)

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[4] In fact, it appears that Borden was not referring to Articles of the New Jersey Constitution, but paragraphs under Article 1. While Article 1 of the New Jersey Constitution establishes individual rights, Article 4 establishes the powers of the New Jersey Legislature, Article 6 establishes the powers Jersey, and Article 18 does not exist. In contrast, the relevant paragraphs of Article 1 provide the following rights: liberty (para. 1), free exercise of religion (para. 4), freedom of speech (para. 6), and freedom of association (para. 18). See N.J. Const. art 1, ¶¶ 1, 4, 6, 18.

preliminary and permanent injunctions preventing the defendants from enforcing the guidelines and the Board's statement, or from "taking any action of any kind, by way of complaint or otherwise, against Coach Borden" for his silent acts of bowing his head and taking a knee during the team's prayers; and (3) an order vacating the guidelines and the Board's statement.

The School District filed a motion for summary judgment that primarily focused on whether its policy was proper under First Amendment jurisprudence, arguing that it did not violate the Free Exercise Clause, and its policy was necessary because Borden's prayer activities violated the Establishment Clause. Borden filed a cross-motion for summary judgment, and expressly stated that he was not asserting a claim under the Free Exercise Clause despite his citation of paragraph 4 of the New Jersey Constitution in his complaint. Borden argued that "his First and Fourteenth Amendment United States constitutional rights as well as Article 1 ¶¶ 1, 6 of his New Jersey constitutional rights" protect his "symbolic conduct."[5] Further, Borden argued that the

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[5] Borden did not specifically assert a claim as to his rights under the First Amendment of the United States Constitution. His complaint did, however, state a claim as to his Due Process rights under the Fourteenth Amendment of the United States Constitution. Thus, Borden arguably asserted a claim under the First Amendment because an individual's free speech rights under the First Amendment apply

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School District's justification for its policy was based on an erroneous interpretation of the Establishment Clause.

On July 25, 2006, the District Court heard oral argument on the summary judgment motions, and following argument, Judge Cavanaugh entered his decision on the record from the bench. He stated:

> "I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

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to the states through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). The defendants have not argued that Borden did not assert a claim under the First Amendment. Even if they had, however, it would not change our analysis, because Borden stated a claim under the free speech clause of the New Jersey Constitution, which has protections that are "generally interpreted as co-extensive with the First Amendment." *Twp. Of Pennsauken v. Schad*, 733 A.2d 1159, 1169 (N.J. 1999) (citing *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137 (N.J. 1998)). Thus, while we do not reach a conclusion on whether he stated a free speech claim under the First Amendment, we will assume that he did for the purposes of our analysis.

> I believe to preclude the Plaintiff from such an action would be a violation of his rights. I believe the Directives as stated are overbroad and vague. To threaten the Plaintiff with insubordination if he is to participate places him in an untenable position.
>
> I find that the Plaintiff's request to bow his head in silence and take a knee do not violate the Establishment Clause of the Constitution.
>
> I find, further, that the Defendants' directive regarding the Plaintiff's nonparticipation is over broad and vague, and violates the Plaintiff's First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, as well as New Jersey's constitutional rights to liberty and free speech.
>
> Accordingly, since there are no issues of material fact left in dispute, as a matter of law, I deny the Defendants' motion and grant the Plaintiff's motion for summary judgment."

On July 26, 2006, the District Court entered an order denying the defendants' motion for summary judgment, granting Borden's cross-motion for summary judgment, and awarding Borden costs and counsel fees. The defendants' timely appeal followed.

II.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367(a). We have jurisdiction over final judgments of the District Court under 28 U.S.C. § 1291.[6] We

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[6] Borden argues that we do not have jurisdiction over this appeal because it has become moot. He argues that he only sought relief for the 2006 season, and because his coaching contract is subject to annual renewal, a live controversy, as required by Article III, Section 2 of the United States Constitution, no longer exists. However, this appeal contains the factors necessary to warrant a finding that it is not moot. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). First, the School District has an ongoing injury. *See id.* at 288; see also *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 132 (3d Cir. 2002). The District Court's decision did not pertain to the 2006 season alone. Instead, the District Court found that the guidelines were overbroad and vague, which invalidates the guidelines as applied to any faculty member. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (stating that where a court determines that a statute or policy is overbroad, that ruling "invalidate[s] all enforcement of that law"). Second, Borden continues to have an interest in the present case. *See Pap's A.M.*, 529 U.S. at 288. He is likely to be rehired as the football coach each year because the School District has rehired him each year for twenty-five consecutive years, and more importantly, the School District's guidelines affect him at all times as

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exercise plenary review over a district court's grant of summary judgment, and will uphold the district court's grant of a summary judgment motion on any basis so long as that basis was previously presented to the district court. *Nasir v. Morgan*, 350 F.3d 366, 368 (3d Cir. 2003). Moreover, "[o]ur review over constitutional issues is plenary." *United States v. One Toshiba Color Television*, 213 F.3d 147, 151 (3d Cir. 2000).

III.

The District Court found that the School District's policy prohibiting faculty participation in student-initiated prayer was unconstitutional on its face because it was both overbroad and vague.

It also found that the policy was unconstitutional in its application to Borden because it violated Borden's constitutional rights to freedom of speech, academic freedom, freedom of association, and due process. Finally, it found that Borden's requested silent acts of bowing his head and taking a knee while

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a tenured teacher at EBHS. Finally, "this is not a run of the mill voluntary cessation case . . . [because] it is the plaintiff who, having prevailed below, now seeks to have the case declared moot." *See id.* As in *Pap's A.M.*, we have an interest in preventing litigants from "manipulat[ing] the Court's jurisdiction to insulate a favorable decision from review." *Id.* Therefore, the case before us is not moot, and we have jurisdiction to review it.

his team prayed would not violate the Establishment Clause. We address each of these issues in turn.

A. Overbreadth and Vagueness

Borden challenged the guidelines and the Board's statement on their face, arguing that they are unconstitutionally overbroad and vague. The District Court agreed. For the reasons that follow, the District Court's conclusions are erroneous.

1. Overbreadth

Under the First Amendment overbreadth doctrine, a person may challenge a statute or policy, even though it is not unconstitutional as applied to that particular person, because "[its] very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A court must consider that the overbreadth doctrine is "strong medicine" that should be used "sparingly and only as a last resort." *Id.* at 613. As a result, "a single impermissible application" is insufficient to deem a statute or policy invalid, *New York v. Ferber*, 458 U.S. 747, 772 (1982) (internal quotation marks and citation omitted), and instead, "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Id.* at 771.

Thus, the proper inquiry is whether a statute or policy "prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). To determine how broad the

statute or policy sweeps, we look to four factors: (1) "the number of valid applications," (2) "the historic or likely frequency of conceivably impermissible applications," (3) "the nature of the activity or conduct sought to be regulated," and (4) "the nature of the state interest underlying the regulation." *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 226 (3d Cir. 2004) (internal quotation marks and citation omitted).

Based upon the Gibson factors, we conclude that the School District's guidelines and the Board's statement are not unconstitutionally overbroad. Borden argues that this policy will reach beyond impermissible faculty involvement in prayer and, in addition, will prohibit permissible faculty religious exercise. We will address the two relevant paragraphs of the guidelines and the Board's statement separately.

Paragraph two of the guidelines prohibits a school official from "encourag[ing], lead[ing], initiat[ing], mandat[ing], or otherwise coerc[ing]" students into prayer. For this paragraph, the number of valid applications is immense. The Supreme Court has held that a school district is in violation of the Establishment Clause where "the degree of school involvement makes it clear that the [prayer activities] bear the imprint of the State and thus put school-age children who objected in an untenable position." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (internal quotation marks and citation omitted). Thus, if a school "affirmatively sponsors the particular religious practice of prayer," it is in violation of the

Establishment Clause. *Id.* at 313. Paragraph two of the guidelines strikes at the heart of this prohibition. Generally, if a school official is engaging in student prayer to the extent that they are leading it, initiating it, or requiring it, the school official, and thus the school district, is violating the Establishment Clause. In fact, Borden does not point to a possible misapplication of this portion of the guidelines. Moreover, the Supreme Court has noted that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). Therefore, paragraph two of the guidelines is not unconstitutionally overbroad.

Paragraph three of the guidelines prohibits a school official from "participat[ing] in any student-initiated prayer. This paragraph of the guidelines similarly has numerous valid applications. A school district also violates the Establishment Clause if "a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion." *Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004); *see also County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 596 (1989) (adopting the endorsement test). Not every religious display of a school official will have the necessary "history and context" to be an Establishment Clause violation, but to the extent that this paragraph is overbroad, it is not so substantial as to make the guidelines invalid. Rather, any concern about overbreadth may "be

cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16. Moreover, the School District is equally as interested in avoiding Establishment Clause violations in this way. Therefore, paragraph three of the guidelines is not unconstitutionally overbroad.

Borden also takes issue with the Board's statement that it "cannot and will not tolerate violations of these rules by any employee of the district," arguing that the statement does not describe what conduct it prohibits. However, the statement began, "[w]e respect the rights of any employee to disagree with policies, procedures and legal interpretations." It is obvious to us that the rules to which the Board is referring are the recently promulgated guidelines that had been distributed to all faculty only ten days before the October 20 meeting. Because the October 20 statement is simply referring to teachers following the School District's guidelines, the same analysis applies to it as to the guidelines themselves. For the same reasons, we find that the Board's statement is not unconstitutionally overbroad.

2. Vagueness

In a void-for-vagueness challenge, we must ensure that a statute or standard is fair in that it is not so vague that a party would not know what conduct is prohibited. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992). Thus, a statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning."

Broadrick, 413 U.S. at 607 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). .The inquiry is completed on a case-by-case basis, and the party opposing the statute or standard must show that it is vague as applied to him. *San Filippo*, 961 F.2d at 1136. In completing this analysis, it is important to note that, in the civil context, statutes need not be as precise as in the criminal context and are, therefore, less likely to be invalidated under a void-for-vagueness challenge. *Id.* at 1135. Borden claims that the use of the word "participate" renders the guidelines unconstitutionally vague. Standing alone, the word "participate" may be vague. However, "participate" cannot be read in isolation, but must be read in the context of the entire paragraph discussing the prohibition on faculty participation with student-initiated prayer. The paragraph prohibiting faculty participation elaborates on what it considered participation by quoting from the Fifth Circuit's decision in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995). Thus, the faculty, including Borden, knew that the prohibition on participating in prayer with students included joining hands in prayer or demonstrating some approval of or solidarity with students' prayer. Such a description is "'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . consonant alike with ordinary notions of fair play and the settled rules of law.'" *San Filippo*, 961 F.2d at 1136 (quoting *Connally*, 269 U.S. at 391).

Moreover, we find support that the word "participate" is not vague from the Supreme Court's

decision in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In *Mergens*, a school district refused access to a Christian student group, and the group brought suit arguing that the school district was in violation of the Equal Access Act, 20 U.S.C. §§ 4071 et seq., which prohibits public secondary schools from denying equal access to student groups. 496 U.S. at 232-33. The school district responded that the Act violated the Establishment Clause and thus was unconstitutional. *Id.* at 233. However, the Court held that the Act did not violate the Establishment Clause. *Id.* at 253. In reaching its decision, the Court relied extensively on a provision of the Act that limited the faculty involvement permissible in any student religious groups to a "nonparticipatory capacity." 496 U.S. at 236, 251- 53 (citing 20 U.S.C. § 4071(c)(3)). The Act does not define "nonparticipatory capacity," and the Court did not define it either. Nevertheless, the Court found that the provision removed the risk of both "official state endorsement or coercion," *id.* at 251, and excessive entanglement with religion, *id.* at 253, because it removed the possibility that school officials would be "participating" in the students' religious activities. Considering the Court's reliance on the "nonparticipatory" provision of the Act without a definition of what the word "participate" means, it is difficult to conceive how the School District's guidelines could be so vague that people of common intelligence could not "guess at [their] meaning." *Broadrick*, 413 U.S. at 607. Therefore, for all of the above reasons, we find

that the guidelines are not unconstitutionally vague.

B. As-Applied Constitutional Challenges

In addition to arguing that the policy prohibiting faculty participation in student-initiated prayer was unconstitutional on its face, Borden also challenged the policy as it applied to him, arguing that it violated his constitutional rights to freedom of speech, academic freedom, freedom of association, and due process. The District Court agreed. Again, for the reasons that follow, the District Court's conclusion is erroneous.

1. Freedom of Speech

The first issue is whether the School District's guidelines and the Board's statement violated Borden's right to freedom of speech under the New Jersey Constitution and the First Amendment of the United States Constitution.[7] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This provision applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652,

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[7] We will use federal constitutional principles of free speech rights in our analysis because the free speech clause of the New Jersey Constitution "is generally interpreted as coextensive with the First Amendment." *Schad*, 733 A.2d at 1169.

666 (1925). The Supreme Court has held that the First Amendment prohibits the government from "regulat[ing] speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

The question is whether the First Amendment protects Borden, the employee of a public school system, when he bows his head and takes a knee with his team while they pray. As our case law indicates, "the day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment." *Sanguigni v. Pittsburgh Bd. of Pub. Educ.* , 968 F.2d 393, 396 (3d Cir. 1992) (citing *Connick v. Myers*, 461 U.S. 138, 143-44 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). However, while "public employees enjoy substantial free speech rights," *id.* at 396, those rights are limited. *See Connick*, 461 U.S. at 148-54; *Pickering*, 391 U.S. at 568.

To determine whether the First Amendment protects a public employee's speech, the Supreme Court has established a two-prong test. Under the first prong, the court must determine whether the employee is speaking upon matters of public concern. *Connick*, 461 U.S. at 146. If the employee's speech relates only to his or her personal interest, the First Amendment does not protect the speech because "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. However, if the employee's speech is on a matter of public interest, the second prong is triggered and requires the court to engage in

the *Pickering* balancing test. *See id.* at 150. The balancing is "between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.[8] Because we find that

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[8] We reject Borden's argument that we should apply the Supreme Court's standard in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), rather than the standard set forth in *Pickering* and *Connick*. In *Tinker*, the Supreme Court specifically identified both students and teachers as those who have First Amendment rights, stating that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. However, the Court in *Tinker* was dealing with a question of the protections given to a student's speech, not a teacher's speech. *Id.* at 513 (holding that students have free speech rights unless the student's conduct "for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others"); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988) (noting that *Tinker* involved a question of student speech). More importantly, *Tinker* did not alter the test that the Supreme Court established to evaluate the speech of a public employee in *Pickering*, 391 U.S. at 568, and then *Connick*, 461 U.S. at 146. *Pickering* involved a teacher who wrote a letter to a

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Borden's speech was not on a matter of public concern, we do not need to engage in the *Pickering* balancing test.

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newspaper expressing concern regarding the management of the school district, and the Court held that the teacher, as a public employee, had a right to freedom of speech. 391 U.S. at 574-75. *Connick* elaborated on the proper test for the speech of a public employee. *See* 461 U.S. at 146-50. Therefore, our application of *Pickering* and *Connick* is appropriate in these circumstances.

i. Matter of Public Concern[9]

Under the test established in *Pickering* and *Connick*, we must first determine whether Borden's silent acts of expression are on a matter of public concern. Borden alleges two interests that his silent acts serve: (1) providing the team with feelings of unity and increasing team morale; and (2)

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[9] Borden argues that we may not address this issue because the defendants did not argue that the speech was not on a matter of public concern in their initial brief or their reply brief before the District Court. However, "`[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). Thus, we must engage in a proper constitutional analysis of whether Borden has a free speech right to engage in his proposed silent acts regardless of what legal theory he or the defendants argued at any point in this litigation. Here, a proper constitutional analysis requires us to consider whether Borden's speech was on a matter of public concern before we make any other determinations. Therefore, not only are we not prohibited from engaging in step one of the *Connick* test, we must do so.

respecting the players' prayers.[10] For the reasons that follow, we find that Borden's stated interests are personal to Borden and his team and are not matters of public concern

Connick instructs that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48.[11] The content of speech on a matter of public concern generally addresses a social or political concern of the community. For example, we have stated that speech is on a matter of public concern if it "relate[s] to broad social or policy issues," including expressing the desirability of assassinating the President or complaining about racial discrimination. *Sanguigni*, 968 F.2d at 397 (citing

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[10] To the extent that Borden argues that his speech protects student-initiated prayer, his argument is unfounded. He would like to bow his head during a pre-meal grace and take a knee with his team before a game. These silent acts do nothing to protect student-initiated prayer because the students are able to engage in student-initiated prayer regardless of Borden's silent acts. Thus, we find his argument unavailing.

[11] Contrary to Borden's contention, this question is one of law, and thus is properly considered by a reviewing court. *Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact.").

Rankin v. McPherson, 483 U.S. 378, 386-87 (1987); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)). We have also categorized speech "implicat[ing] the discharge of public responsibilities by an important government office, agency, or institution" as speech addressing a matter of public concern. *See id.* at 397-98 (citing cases involving speech that touched on the pressure to work on political campaigns, the allocation of funds to certain school programs, government corruption, and the lowering of academic standards and its effects); *see also Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993) (stating that speech is on a matter of public concern where "the speaker seeks to 'bring to light actual or potential wrongdoing or breach of public trust' on the part of government officials" (quoting *Connick*, 461 U.S. at 148)). Finally, the content of speech is on a matter of public concern where it "relate[s] primarily to the way in which a government office [i]s serving the public." *Sanguigni*, 968 F.2d at 398 (citing *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983), in which a county employee criticized the state and county governments at a meeting of the county's governing body regarding how he thought those governments were wasting taxpayer's money). In short, the content of these types of speech goes to the core of the First Amendment because it adds to the debate on matters of public importance.

In contrast, the content of an employee's speech is not a matter of public concern where the comments are only with regard to the morale of the office. *See Connick*, 461 U.S. at 148 (holding that the employee's

questionnaire regarding office morale was not a matter of public concern because she was merely gathering "ammunition" against her supervisors); *Sanguigni*, 968 F.2d at 399 (holding that an employee's statements regarding morale alone do not rise to the level of a matter of public concern). In *Connick*, the Supreme Court noted that the level of morale in a government office may relate to the efficiency of that office, and the public may be interested in that efficiency. 461 U.S. at 148. However, where the employee's efforts did not focus on relaying that information to the public, it could not be speech on a matter of public concern. *Id.* at 148 & n.8.

In the present case, Borden portrays the content of his conduct as secular gestures intended to promote solidarity, help form the team into a cohesive family unit, and show respect for the players' prayers. The content of his message, however, is not a matter of public concern. Borden does not perform these silent acts as part of a broad social or policy statement of being able to take a knee or bow his head in public.[12] Additionally, he is not shedding light on any matter with regard to EBHS's operations that would be important to the public because his silent acts do not touch upon the way in which a government institution is discharging its responsibilities. *See, e.g.*, *Pickering*, 391 U.S. at 569-70 (finding that

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[12] Borden does not allege that his silent acts are religious speech that is on a matter of public concern, and we do not reach that question.

criticisms of a school district's allocations of funds is speech on a matter of public concern). Instead, Borden expressly argues that he wishes to engage in this speech out of concern for his team's morale. However, he is not trying to bring public morale issues within the school's administration, but is merely trying to bolster his team by demonstrating that "this team is a family," which does not amount to a matter of public concern. See *Connick*, teacher's criticism of the school district in a letter to a newspaper).

In the present case, the form and context of Borden's silent acts only reinforce its non-public nature. Borden's speech does not occur in any type of official proceeding, and even more importantly, Borden's speech does not extend into any type of public forum. In fact, Borden himself admits that the bowing of his head and taking of a knee occur in private settings, namely at an invitation-only dinner and in a closed locker room. Again, we find further support for this decision in the Sixth Circuit's opinion in *Dambrot*, where the court noted the private nature of the coach's message to his players because the coach's pep talk was given in a locker room for the private consumption of his players. 55 F.3d at 1188. Thus, we conclude that as in *Dambrot*, the bowing of Borden's head and taking a knee are meant for the consumption of the football team only. Therefore, Borden's expressive conduct of bowing his head and taking a knee are not matters of public

concern triggering protection of his right, as a public employee, to freedom of speech.[13]

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[13] Based on our prior decisions, as well as the decisions of other courts of appeals, Borden's actions do not constitute speech on a matter of public concern regardless of the application of the Supreme Court's most recent case in the line of cases on the free speech rights of public employees. *See Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). In *Garcetti*, the Court considered whether the First Amendment protects a public employee's speech when the employee speaks pursuant to his or her official duties. *Id.* at 1960. It held that the analysis established by *Pickering* and its progeny applies only when an employee speaks as a citizen. *Id.* Thus, the First Amendment simply does not protect speech made pursuant to the employee's official duties. *Id.* After reaching its conclusion, the Court expressly stated that it left the determination of whether this analysis would apply in the educational context for another day. *See id.* at 1962 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."). If *Garcetti* applied to this case, Borden's speech would not be protected as it was made pursuant to his official duties as a coach of the EBHS football team and not as an ordinary citizen. However, even if *Garcetti* does not apply in the educational context, Borden's conduct is not on a

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ii. *Pickering* Balancing Test

We find it unnecessary to engage in the *Pickering* balancing test in the present case because Borden does not have a free speech right that would trigger the analysis. In order to utilize the balancing test, the public employee must have a free speech right to weigh against the government's interest in prohibiting the speech. However, Borden's silent acts of bowing his head and taking a knee are not on matters of public concern so he does not have a free speech right to trigger the balancing test. For the above reasons, we conclude that the guidelines and the Board's statements did not violate Borden's free speech rights under the First Amendment of the United States Constitution and under the New Jersey Constitution.

2. Academic Freedom

Borden argues that the right to academic freedom affords him the right to exercise professional judgment in teaching his players respect for others, or as he calls it, "Character Education." In making this argument, Borden specifically points out that he is both a football coach and a tenured teacher at EBHS, and states that "[he] believes in teaching [the players] how to be persons of good character and principle."

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matter of public concern for the reasons just described.

We have held that a teacher's in-class conduct is not protected speech. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." (internal quotation marks and citations omitted)). The rationale for this holding is that the teacher is acting as the educational institution's proxy during his or her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students. *See Brown v. Armenti*, 247 F.3d 69, 74-75 (3d Cir. 2001).

In order to determine if the teacher's conduct is considered in-class conduct, we must determine whether the teacher is engaging in one of the "four essential freedoms" that constitute academic freedom. *Id.* at 75. The 'four essential freedoms'" include the right of an educational institution "to choose 'who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)). Based on this analysis, we have previously determined that a teacher's in-class conduct includes choosing one's own teaching methods, *id.* at 491-92, utilizing one's own "classroom management technique," *Bradley*, 910 F.2d at 1176, and assigning grades to a student, *Brown*, 247 F.3d at 75.

In the case before us, Borden concedes that the silent acts of bowing his head and taking a knee are tools that he uses to teach his players respect and

good moral character. Thus, by his own admission, his coaching methods are pedagogic. As a result, he is acting as a proxy for the School District, and the School District may choose both how its students are taught and what its students are taught. Here, the School District adopted Pachman's guidelines because it determined that Borden's pedagogic methods were inappropriate. As evidenced by this continued litigation, the School District continues to find Borden's pedagogic methods of teaching his players respect by engaging in his silent acts inappropriate. While Borden certainly has the right to voice his disagreement with the School District's policy, in accord with our past precedent, he does not have a right to act in contravention of the School District's policy based upon a right to academic freedom.[14] For the above reasons, the

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[14] Borden alleges that a decision that he does not have the academic freedom to engage in these acts amounts to controlling his mind. However, our precedent has consistently demonstrated that it is the educational institution that has a right to academic freedom, not the individual teacher. *See, e.g., Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001). The teacher, in turn, has the right to speak on matters of public concern, including advocating certain pedagogic methods. *See Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) ("[A]lthough [a teacher] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the

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District Court erred in holding that the guidelines and the Board's statement violated Borden's right to academic freedom.

3. Freedom of Association

Borden's complaint also alleged, and the District Court held, that the School District's guidelines and the Board's statement violated Borden's right to freedom of association. Specifically, he asserts that First Amendment jurisprudence demonstrates that the policy infringes on his "right to associate with his players by forcibly segregating [him], both physically and mentally, from his players while they engage in the important team act of saying pre-game prayers." However, we find this argument unavailing.

While the Supreme Court has held that the Constitution protects certain relationships, those protected relationships require a closeness that is not present between a high school football coach and his team. The Court has not limited the protection to familial relationships, but generally the protected relationships include "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." *See Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) (citations omitted); *id.* at 546-47 (not extending the protection to the Rotary Club). We do not doubt that

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classroom."). However, the teacher cannot act in contravention of his or her educational institution's in-class policies in the name of academic freedom.

football coaches have a special relationship with the players on their team. However, the relationship is typically not so close as to involve "'not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Id.* at 545 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984)). Therefore, we find that the guidelines prohibiting him from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so. *See infra* Part III.C.[15]

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[15] While Borden's argument is not entirely clear, he may also be asserting an expressive association claim. To the extent that Borden makes this argument, we deem it to fail. The football team must be an "expressive association" for it to fall within the ambit of the First Amendment's protection. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). To be an "expressive association," the group does not need to be an advocacy group, but it "must engage in some form of expression, whether it be public or private." *Id.* The Supreme Court has held that the Boy Scouts engage in expressive association because the organization seeks to instill values in the youth members. *Id.* at 649-50.

Borden argues that, as a football coach, he similarly instills values in the members of his team. However, unlike the Boy Scouts in *Dale*, Borden is instilling values in the team as part of his duties as a

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4. Due Process

Borden also argues that the guidelines and the Board's statement violated his rights to due process. In the context of school district policies, we have previously stated that the same test for vagueness applies to a procedural due process claim. *Bradley*, 910 F.2d at 1177. Thus, a rule prohibiting conduct must not be "in terms so vague that people of common intelligence must guess as to its meaning..." *Id.* As indicated by the discussion above, the guidelines and the Board's statement were not unconstitutionally vague. *See supra* Part III.A.2.

Therefore, Borden must point to a fundamental right that he has which the policy infringed upon in order to establish a due process violation. He can do no such thing. Borden tries to cite to federal case law regarding privacy rights, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Lawrence v. Texas*, 539 U.S. 558 (2003), to argue that the School District has intruded upon his privacy, thoughts, autonomy, desires and wishes. He claims that the School District's requirement that he not engage in taking a knee and bowing his head degraded him as a

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public school employee and not as part of a private association. As discussed in part III.C of this opinion, *see infra*, the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause. Therefore, we find any expressive association argument that Borden is attempting to make to be invalid.

person and humiliated him in front of his team. However impassioned Borden's arguments may be, they lack any basis in the law. Borden has no interest — privacy, liberty, or otherwise — in behavior that violates the Establishment Clause.[16] For these reasons, the guidelines and the Board's statement did not infringe on Borden's due process rights.

C. The School District Had a Right to Adopt the Guidelines Because It Was Concerned About Establishment Clause Violations.

As discussed above, the School District's guidelines and the Board's statement were not unconstitutional on their face and did not violate Borden's constitutional rights. We have previously held that, where an official at a public school does

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[16] Borden attempts to argue that the New Jersey Constitution provides him greater due process protections than the U.S. Constitution. Under the New Jersey Constitution, claims involving fundamental rights are to be analyzed using a balancing test, "consider[ing] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985). However, the balancing here has the same result as under federal constitutional principles because the public need — to prohibit Establishment Clause violations, which as discussed below, are present in this case — is so great. Therefore, Borden's argument fails.

not have a First Amendment right to his or her expression, the school district's policy does not need to be "reasonably related to a legitimate educational interest." *See Edwards*, 156 F.3d at 491. Thus, because Borden has no First Amendment right to his silent acts, we do not need to analyze the policy under this standard. However, even if we applied that standard to the present case, we would arrive at the same result: the School District had a right to adopt its policy.

The School District has a legitimate educational interest in avoiding Establishment Clause violations, and the guidelines are reasonably related to that interest. The Supreme Court has stated that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Pinette*, 515 U.S. at 761-62; *see also Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) (IA] State has a compelling interest in not committing *actual* Establishment Clause violations."). If compliance with the Establishment Clause can rise to a compelling state interest, surely it is a legitimate educational interest. Moreover, the guidelines are related to that interest because, as discussed in the overbreadth and vagueness analysis, the prohibited conduct would violate the Establishment Clause. In fact, based on the history and context of Borden's conduct in coaching the EBHS football team over the past twenty-three years, Borden is in violation of the

Establishment Clause when he bows his head and takes a knee while his team prays.[17]

Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting

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[17] The defendants suggest that we do not need to reach the issue of whether Borden's requested actions, to bow his head and take a knee while his team prays, constitute an Establishment Clause violation. Borden's complaint did not make any allegations regarding the Establishment Clause; the Establishment Clause only surfaced in the cross-motions for summary judgment to the District Court because the defendants thought that Borden was asserting a Free Exercise claim, which he was not. However, in reaching its decision, the District Court found "that the Plaintiff s request to bow his head in silence and take a knee do not violate the Establishment Clause of the Constitution." This decision was a declaratory judgment because it "declare[d] the rights and other legal relations" of the interested parties. 28 U.S.C. § 2201. The District Court was within its right to grant a declaratory judgment. *See* Fed. R. Civ. P. 57. But we must now review the district court's decision, *see* 28 U.S.C. § 2201, and in reviewing a decision to grant a declaratory judgment, "we will exercise plenary review over the district court's conclusions of law." *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 30 (3d Cir. 1995). Therefore, we find it necessary to reach the District Court's conclusion of law.

an establishment of religion." U.S. Const. amend. I. This provision applies equally to the states, including public school systems, through the Fourteenth Amendment. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). The Supreme Court has set forth three tests for determining whether governmental action violates the Establishment Clause: the coercion test, the *Lemon* test, and the endorsement test. *Modrovich*, 385 F.3d at 400-01. We do not address whether Borden's conduct violates the Establishment Clause under the coercion[18] and *Lemon*[19] tests because we find that Borden's behavior violates the Establishment Clause under the endorsement test.

The endorsement test applies "[i]n cases involving state participation in a religious activity." *See Santa Fe*, 530 U.S. at 308. For example, in *Santa Fe*, the leading case on prayers before high school football

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[18] The coercion test looks at whether the government is "coerc[ing] anyone to support or participate in religion or its exercise . . .." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[19] The *Lemon* test, named after the Supreme Court case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), established a three-prong test, holding that conduct violates the Establishment Clause "if (1) it lacks a secular purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement of government with religion." *Modrovich*, 385 F.3d at 401 (citing *Lemon*, 403 U.S. at 612-13).

games, the Supreme Court used the endorsement test in considering whether a school district violated the Establishment Clause where its policy allowed a student to deliver a pre-game prayer based on a voting system. *Id.* Here, Borden, an employee of the School District as both the head football coach and a tenured teacher, would like to bow his head and take a knee while students pray. Thus, the endorsement test is applicable here because these facts involve a state employee engaging in the religious activity of students in some fashion.

The relevant question under the endorsement test is "whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion." *Modrovich*, 385 F.3d at 401; *see also Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. at 596 (adopting the endorsement test). The test does not focus on the government's subjective purpose when behaving in a particular manner, but instead focuses on the perceptions of the reasonable observer. *Modrovich*, 385 F.3d at 401.

The history and context of Borden's prayer activities with the team, if challenged, could have been Establishment Clause violations. In a case that is similar to the facts of the present case prior to the School District's enactment of the policy, the Court of Appeals for the Fifth Circuit found that a basketball coach's involvement in prayer "signal[ed] an unconstitutional endorsement of religion." *Duncanville*, 70 F.3d at 406. In *Duncanville*, a basketball coach recited the Lord's Prayer with his players during practices and after games. *Id.* at 404.

Parents of the students challenged this practice, and the district court granted an injunction which prohibited "[the school district], its employees and its agents from: leading, encouraging, promoting, or participating in prayers with or among students during curricular or extracurricular activities, including before, during, or after school-related sporting events.. .. Students may voluntarily pray together, provided such prayer is not done with school participation or supervision." *Id.* at 405-06. The school district challenged the district court's injunction, arguing that this prohibition violated its employees' rights to free exercise of religion, freedom of association, freedom of speech, and academic freedom. *Id.* at 406. The Fifth Circuit disagreed, stating that the government's facilitation of the free exercise of religion or free expression rights cannot "'supersede the fundamental limitations imposed by the Establishment Clause.'" *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 586-87 (1992)). In addition, the context of the challenged prayer activities, which occurred during "school-controlled" activities that the team must attend, demonstrated that the coaches' "actions [were] representative of [school district] policies." *Id.* Thus, the Fifth Circuit upheld the District Court's injunction, finding that the coaches' participation was "an unconstitutional endorsement of religion." *Id.*

Likewise, Borden's past conduct "signals an unconstitutional endorsement of religion." *Id.* For twenty-three years, Borden led the team in a pre-game prayer in the locker room. During that same period of time, Borden orchestrated a pre pre-meal

grace for his team. He originally had a chaplain conduct the pre-meal grace. This practice changed only after school officials asked him to stop; then he had the chaplain write the grace and he selected seniors on the team to recite it. Additionally, during at least three seasons, Borden led the team in the first prayer of the season. Both of these activities, the locker room preparations and the pre-game meals, were school-sponsored events. As in *Duncanville*, Borden's involvement in prayer at these two activities — as a participant, an organizer, and a leader — would lead a reasonable observer to conclude that he was endorsing religion.

In analyzing Borden's request to engage in silent acts with his teams, we must consider all of his prior prayer activities with his team as the Supreme Court did in *Santa Fe*. For many years, the Santa Fe Independent School District began each high school football game with a prayer led by the "Student Chaplain." *Santa Fe*, 530 U.S. at 294, 309. After realizing that such conduct would violate the Establishment Clause, the school district developed a two-step student election process, which allowed students to (1) first decide whether an invocation would be given at the beginning of a game; and (2) then elect the speaker to give the invocation. *Id.* at 306. The Supreme Court considered the many years of pre-game prayers at the school, and the evolution of the policy, including the name "Prayer at Football Games" and its stated purpose, which is to "solemniz[e] the occasion. *Id.* at 308-09. It found that "an objective Santa Fe High School student will unquestionably perceive the inevitable pre-game

prayer as stamped with her school's seal of approval." *Id.* at 308. Moreover, it stated that all of these factors indicated that the purpose of the policy was to preserve the popular pre-game prayer, regardless of the school district's stated purposes. *Id.* at 309. Thus, it found that the policy failed the endorsement test and violated the Establishment Clause. *Id.* at 308-10.

Similarly to *Santa Fe* and as discussed above, the current controversy is built upon a significant history of pre-game prayers that involved Borden. Borden organized prayers for the pre-meal grace at the team dinner; he had a chaplain say a prayer and then selected seniors to say the prayer. But even more importantly, Borden led prayers himself-- on at least three occasions for the pre-meal grace, and before each game for twenty-three years for the locker room prayer. Additionally, when EBHS officials asked Borden to discontinue this conduct, he initially resigned from his position as coach of the team rather than continue as coach without engaging in the prayer activities. This history of Borden's prayers with the football team leads to a reasonable inference that his current requested conduct is meant "to preserve a popular 'state-sponsored religious practice'" of praying with his team prior to games. *Santa Fe*, 530 U.S. at 309 (citing *Lee*, 505 U.S. at 596).

Borden has stated that his intention in taking a knee and bowing during prayer is to show signs of

respect to his team, not endorse religion.[20] Borden attempts to support this argument by pointing to language in *Duncanville*, which states that "neither the Establishment Clause nor the district court's order prevent [school district] employees from treating students' religious beliefs and practices with deference and respect; indeed, the constitution requires this. Nothing compels [school district] employees to make their non-participation

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[20] As an employee of the School District as both a coach and tenured teacher, Borden's actions can be imputed to the School District. For this reason, Borden's claim that the School District could remove any Establishment Clause violation by writing a disclaimer saying that Borden's speech does not represent the ideals of the School District is simply wrong. Although the Supreme Court has previously suggested disclaimers as a way to demonstrate that a school district is not endorsing religion, *see Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990), that was only applicable in the context of permitting student clubs of a religious nature to meet on school grounds. The Court reasoned that "there is li[illegible] if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Id.* The circumstances are different where, as here, a school official could reasonably be perceived as engaging in the students' prayer activities. Therefore, a disclaimer by the School District would not remove the Establishment Clause violation.

vehemently obvious or to leave the room when students pray . . . ." *Duncanville*, 70 F.3d at 406 n.4.[21]

However, we find Borden's argument to be unavailing. First, the inquiry is not whether Borden intends to endorse religion, but whether a reasonable observer, with knowledge of the history and context of the display, would conclude that he is endorsing religion. *See Modrovich*, 385 F.3d at 401. Additionally, Borden fails to note that the Fifth Circuit does not permit any respectful display to pass muster in evaluating the constitutionality of the display. *See Duncanville*, 70 F.3d at 406 n.4. Instead, the Fifth Circuit, in the sentence immediately following the above quote, stated that, "if while acting in their official capacities, [school district] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion." *Id.* Thus, Borden's reliance on Duncanville is only partially accurate because the respectful display is

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[21] Borden also invokes the football greats, like Bear Bryant, to indicate that taking a knee is merely a gesture in the land of football. However, although taking a knee in a huddle to discuss strategy is a gesture well known to football gurus as being part of the game, Borden said a prayer while taking a knee with his team for over twenty-three years. Based on this undisputed history, a reasonable EBHS player would conclude that Borden is endorsing religion if he continues to take a knee while his team prays.

permissible only if it does not "cross the line" and endorse religion.

We find that, based on the history of Borden's conduct with the team's prayers, his acts cross the line and constitute an unconstitutional endorsement of religion. Although Borden believes that he must continue to engage in these actions to demonstrate solidarity with his team, which is perhaps good for a football team's unity, we must consider whether a reasonable observer would perceive his actions as endorsing religion, not whether Borden intends to endorse religion. A reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer.[22] Based on this history, we hold that a

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[22] Borden argues that the reasonable observer would also be familiar with the School District's previous treatment of religion. He references *Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1254 (3d Cir. 1993), a case in which the School District was admonished for searching the Equal Access Act for loopholes that would allow it to deny a religious club access to the school after hours. Borden argues that this case shows the School District's disdain for religion, and as a result, the reasonable observer would not consider his actions to be religious. However, even if the observer knew of the School District's former problems with religious organizations, the observer would also know that for at least ten years following the *Pope* case, Borden, a

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reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion.[23]

Without Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so

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school official, was involved in prayer activities at the team dinner, and even more importantly, led a team prayer before each game. With this knowledge, the reasonable observer would view Borden's conduct as endorsing religion despite any conflicts with religious organizations that the School District had fifteen years ago.

[23] As additional evidence of an Establishment Clause violation, the defendants argue that the pre-game prayers were not truly student initiated. They suggest that by sending the email to the team captains asking them to poll the team about the prayers and then asking for the results, Borden himself initiated the prayers. The defendants' argument is supported by the Supreme Court's decision in *Santa Fe*, 530 U.S. at 317, which found that a school district violated the Establishment Clause when it sponsored a student vote on student-led prayer. However, we need not make this determination because even if the pre-game prayers were truly student initiated, Borden's participation in them by bowing his head and taking a knee violate the Establishment Clause for the reasons discussed.

clear as it presently is. We agree with Borden that bowing one's head and taking a knee can be signs of respect.[24] Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.[25]

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[24] Judge Barry agrees with this statement. *See* Con. Op. at 70 (Barry, J., concurring) (labeling Borden's actions as "silent, unobtrusive sign[s] of respect").

[25] In his concurring opinion, Judge McKee points to a picture of Borden with his team. *See* Con. Op. at 55-57 (McKee, J., concurring). In doing so, he suggests that a reasonable observer could "conclude that the coach is praying with his team - perhaps even that he is leading the team in prayer," *id.*, even if there was no history of the coach praying with his team. We cannot agree with this conclusion because this photograph, standing alone, would be insufficient to satisfy the "fact-specific, case-by-case" inquiry required. *Id.* at 2 (quoting *Modrovich*, 385 F.3d at 402). For a court to complete the required analysis, it would need to consider additional facts, including, for example: (1) Is the team engaging in a moment of silence, or is someone speaking? (2) If a person is speaking, is he saying a prayer? (3) If it is a prayer, is it a player or the coach reciting the prayer? and (4) Who decided to say the prayer? Only after knowing these facts, as well as the coach's history of prayer

(continued..)

However, in Borden's case, the conclusion we reach today is clear because he organized, participated in, and led prayer activities with his team on numerous occasions for twenty-three years. Thus, a reasonable observer would conclude that he is continuing to endorse religion when he bows his head during the pre-meal grace and takes a knee with his team in the locker room while they pray.

IV.

For all of the above reasons, we conclude that the guidelines and the Board's statement were not unconstitutional on their face, were not unconstitutional as applied to Borden, and in fact, were necessary for the School District in order to avoid Establishment Clause violations. Therefore, we will reverse the District Court's order.

McKEE, Circuit Judge, concurring.

I join Judge Fisher's lead opinion, but write separately to clarify a few points, and express a few concerns. At the outset, I emphasize that we today hold only that (i) the School District's policy is not overbroad and vague; (ii) the policy did not violate Borden's constitutional rights to free speech, freedom of association, academic freedom, or due process; and (iii) under the circumstances here, Borden's practice of bowing his head and "taking a

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activities with his team, could any court make the determination required under the endorsement test.

knee" as his team prays violates the Establishment Clause.[26]

However, I do not join my colleagues' suggestion that we might reach a different result here absent Borden's 23-year history of promoting team prayer. That question is not before us, and I believe that Borden's "respectful display," see Con. Op., *infra*, at 69 (Barry, J., concurring), might well violate the Establishment Clause even absent his 23-year history. Similarly, I can not agree that the football team's pregame ritual can accurately be characterized as "student-initiated" prayer.

I.

In reaching our holding, the lead opinion suggests: "[I]f a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion . . ." *Supra*, at 52; *see also* Con. Op., *infra*, at 71 (Barry, J., concurring). I am not as sure. Although I agree that would be a more difficult case, it is not clear to me that our Establishment Clause inquiry would yield a different result. "[E]very Establishment Clause challenge requires a fact-specific, case-by-case analysis."

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[26] 'Both of my colleagues, as well as the district court and the parties, refer to Borden's conduct as "taking a knee." Accordingly, I will also use that phrase.

Modrovich v. Allegheny County, 385 F.3d 397, 402 (3d Cir. 2004). As discussed in the lead opinion, our Establishment Clause inquiry here turns on whether an objective observer would interpret Borden's proposed actions as a state endorsement of religion. *Supra*, at 38. I believe such an observer could interpret Borden's proposed actions as an endorsement of religion even absent the coach's history of promoting team prayer.

Coach Borden's suit against the School District did not seek a declaration "permitting him to pray with his players," Borden's Br. at 9, but rather "a declaration that he be allowed ... to continue to demonstrate respect for his players by silently bowing his head and taking a knee during The Team Prayers." Compl. ¶ 18. However, as Judge Fisher's lead opinion explains, it is not Coach Borden's subjective intent that controls whether his conduct runs afoul of the Establishment Clause. Rather, the question at the heart of the endorsement test, is whether an objective observer would perceive that Borden, and by extension the School District and therefore the state, is advancing or promoting religious practice. Here, if Coach Borden silently bows his head and takes a knee as he requests, even without knowledge of Borden's 23-year history of involvement with pre-game prayer, any such observer who peered into East Brunswick's locker room

before a game would probably observe something very much like the following[27]

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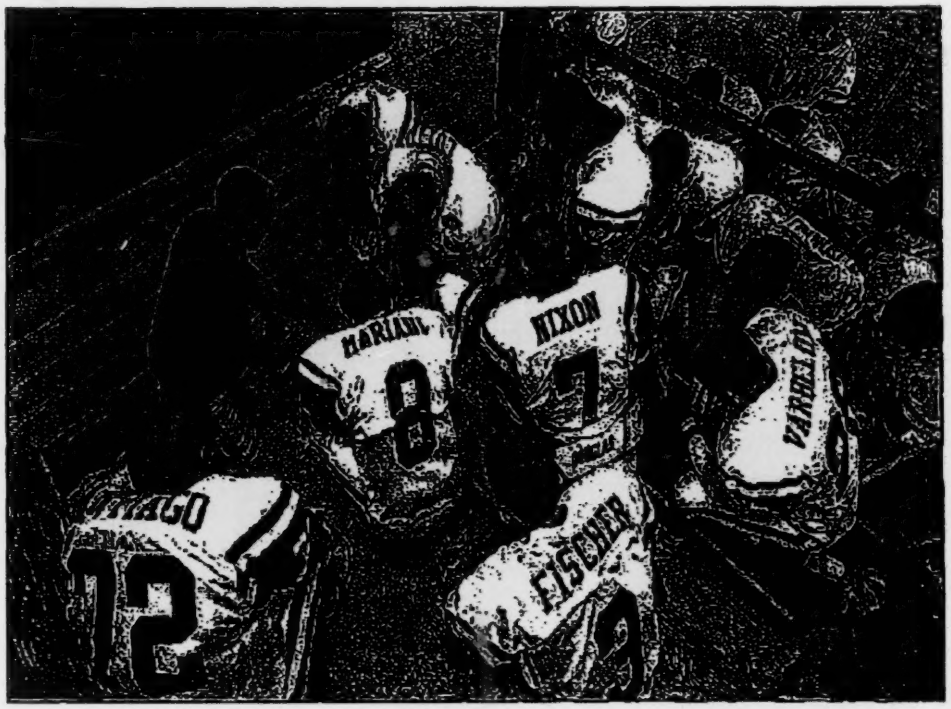
[27] In fairness, it is important to note that when asked at oral argument, counsel for Coach Borden was not able to confirm that this picture, submitted in the School District's Reply Brief, accurately depicts the pregame prayers after the district court's grant of summary judgment. The photograph was not entered into evidence in the district court. However, it is not disputed that the coach in the picture is Coach Borden, and counsel for Borden did not claim that the picture is inaccurate. Regardless of when it was taken, it certainly appears to be what an objective observer would see if he/she were to observe the coach "silently bowing his head and taking a knee." Compl. ¶ 18. In his brief to this court, Borden states that after the district court invalidated the School District's policy, he "silently bowed his head and took a knee with his players while his players prayed before every game during the 2006 season." Borden's Br. at 3. (This photograph was downloaded from the Boston Globe web site, and is available at http://www.boston.com/sports/schools/gallery/11_0706_grossfeld_prayer/) (last viewed March 12, 2008).



It would be neither surprising nor unreasonable if that observer were to conclude that the coach is praying with his team - perhaps even that he is leading the team in prayer. Such a conclusion would certainly be buttressed by knowledge of Coach Borden's history of involvement in team prayer, but the absence of that history would not necessarily yield a different result.

II.

Another troubling consideration (which I amplify below) is that a non-religious student or one who adheres to a minority religion might feel subtle (albeit unintentional) coercion to participate in the ritual despite disagreement or discomfort with it.

That raises a serious Establishment Clause issue under the Supreme Court's "coercion" test.[28]

The district court accepted the argument that the prayer that occurred after October 7, 2005, was "student-initiated." (JA 37). It clearly was not. I have no doubt that Coach Borden is a sincere and remarkably dedicated individual who cares deeply for his players. He is also a very successful coach. Unfortunately, in an apparent desire to do what he thought was best for his players, he lost sight of his role as a teacher in a public school.

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[28] "The Supreme Court has applied the "coercion" test as well as the "endorsement" test in determining whether state action violates the Establishment Clause in the public school context. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying endorsement test and coercion test); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" because "prayer exercises in public schools carry a particular risk of indirect coercion"); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.").

After initiating this litigation, and prior to the start of the 2006 season, Coach Borden directed the captains to poll the football team and ask each player whether or not he wanted to "follow the same practices as last year" regarding prayer at the pregame meals and in the locker room before the games. (JA 497). The captains then personally phoned every member of the football team. Not surprisingly, given the non-anonymous nature of the poll, no player objected. Given the uproar this issue visited on the community, the players must have known how important prayer was to their coach - and no high school athlete would want to disappoint the coach, or (as I shall explain) risk incurring the communal wrath that had been visited on the unfortunate cheerleaders the year before.[29]

I am not suggesting that Coach Borden intentionally pressured his players into voting for pregame prayer ceremonies or that he wanted to manipulate the outcome. Nevertheless, these players were put in the untenable position of either compromising any opposing beliefs they may have had

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[29] Moreover, the Supreme Court has held on more than one occasion that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943), quoted in *Santa Fe*, 530 U.S. at 304-5. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Santa Fe*, 530 U.S. at 304- 05 (citation omitted).

or going on record (at the very least with their captains) as opposing their coach and perhaps a majority of their teammates.

Although the coach thought that the prayers would foster team unity, and even though the captains reported that all players wanted to continue the tradition, the record suggests that the reality was quite different. In the fall of 2005, Superintendent Magistro received a phone call from a "crying and overwrought" woman who identified herself as the mother of an East Brunswick football player. (JA 153-59, 451). The mother complained that her son "was extremely upset at Mr. Borden's fostering and participating in prayer amongst the football players." (*Id.* at 451). When Magistro asked why her son participated in the team prayers despite his discomfort, the mother responded that he "was fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time." (*Id.*). The call was one of the factors that led to the School District policy Borden challenges.

Unfortunately, the coach appears not to have considered the possibility that the tradition he wanted to foster could be troubling for some players and possibly deter others from playing football at all. The Supreme Court addressed an analogous situation in Lee. There, the Court held that a public school could not force nonbelievers to choose between participating in prayer or missing their graduation ceremony.

> Attendance [at graduation] may not be required by official decree, yet it is apparent

> that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which would have motivated the student through youth and all her high school years.

Lee, 505 U.S. at 595. Participation in high school athletics is no less important than attending one's high school graduation. Indeed, the ongoing involvement with high school athletics is undoubtedly far more important to some than a one-time graduation ceremony. High school sports have long been a central part of our communities and they shape the character of many teenagers far more than a single graduation ceremony.

Regrettably, Coach Borden as a teacher (and therefore as a state actor for purposes of the First and Fourteenth Amendments) failed to appreciate that others may not agree with his beliefs or that the religious beliefs that he held dear might be in tension with contrary (but equally valid) beliefs of some of his players. Any player who held opposing beliefs should not have had to "go along to get along" by silently participating in religious observances he disagreed with.

> For, "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." . . . "[W]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school

> context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." . . . The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining [his] classmates at a varsity football game.

Santa Fe, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 592, 594).

Indeed, "it is quite possible that parents of some [students] chose public education precisely so that their children would not be compelled to follow the religious beliefs of others." *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1482 (3d Cir. 1996)(en banc). That likelihood is particularly strong here given the telephone call of at least one "overwrought" parent that Superintendent Magistro received in reaction to pregame prayers before the School District enacted the policy that is challenged here.

This does not, of course, mean that students have no right to pray; they clearly do. Whatever else it may be, prayer is a form of speech and deserves no less protection than secular speech. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).[30] The policy the School District developed in response to the

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[30] Such prayer does not, however, have to occur in the locker room.

complaints about pregame prayers was an effort to protect the First Amendment liberties of everyone in the school community.

The Supreme Court has observed that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Yet, the Court also reminds us that "[i]t is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of [religion] . . . and leave . . . purely religious function[s] to the people themselves and to those the people choose to look to for religious guidance." *Engel*, 370 U.S. at 435.

Coach Borden's dedication to instilling in his players values such as respect and team unity is certainly praiseworthy. However, as we have explained, the laudable intentions of state actors do not control an analysis under the First Amendment. "For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985). This record contains powerful evidence of such division.

Superintendent Magistro testified that she received telephone calls in September 2005 from some parents of cheerleaders. They complained that their daughters were "uncomfortable" when Borden initiated a prayer at a pregame dinner. (JA 153-56). Students apparently learned of these complaints,

and blamed two Jewish cheerleaders. Thereafter, those cheerleaders were publicly ridiculed by other students at athletic events, and the cheerleading squad was taunted, bullied, and booed. (JA 452 at 5). The cheerleaders were even harassed and threatened on a student internet "blog." In the days following Coach Borden's resignation, several internet posts appeared under the heading, "Jewish Cheerleaders who suck!!!." The following are a few examples of the disgusting comments that were posted:

- "First they crucify Jesus, then they got Borden fired . . . . Jews gotta learn to stop ruining everything cool." (JA 460)

- "The jew is wrong. Borden is right. Let us pray." (JA 467)

- "d**n jews . . . then you wonder why hitler did what he did back in the day." (JA 471)

- "MAYBE if [Borden] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law...ehhh maybe not! . . . just suck it up if u don't fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY . . . ." (JA 487-88)

- "Heil Hitla!!! sieg heill." (JA 490)[31]

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[31] Borden's counsel, in his brief and at oral argument, urged us to disregard evidence of parents' calls to the Superintendent and harassment of the cheerleaders:

> [E]very assertion cited to by [the School District] to support every alleged parent or student complaint about Borden's pre-October 7, 2005[,] activity is based on hearsay that is derived from anonymous sources that the [School] District refused to identify. Defendants have not submitted a single sworn, or even unsworn, statement from any alleged complaining student or parent. Nor has the [School] District disclosed the name of any alleged complaining student or parent.

Borden's Br. at 16-17. However, given the nature of these venomous comments, counsel can not seriously suggest that the evidence be ignored merely because students and parents who opposed Coach Borden's policy were not willing to identify themselves and offer direct testimony. The situation is neither new nor unique. In *Santa Fe Independent School District v. Doe*, the Court noted that the district court permitted students and parents to litigate anonymously. 530 U.S. at 294. The opprobrium that can await those who publicly state their opposition to prayer

(continued...)

These exchanges illustrate the continuing relevance of Justice O'Connor's admonition that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The School District attempted to address these concerns by adopting the policy that the district court struck down in the face of Coach Borden's challenge.

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in school is evident from the Court's opinion in *Santa Fe*:

> About a month after the complaint was filed, the District Court entered an order that provided in part: "[A]ny further attempt on the part of District or school administration, . . . teachers, employees or servants of the School District, parents, students or anyone else, . . . to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately.

Id. at 294 n.1 (alteration in original). The district court had to threaten contempt sanctions and criminal liability to protect the parents and students who objected to the practice of prayer at football games. *Id.*

In reversing the district court, we help to ensure the continued vitality of the Establishment Clause as well as the rights of all to worship as they please.

BARRY, Circuit Judge, concurring.

There was no question, and the parties clearly understood, that there was one predominant issue before the District Court: whether the actions in which Borden wished to engage would violate the Establishment Clause of the First Amendment, not whether the conduct in which he had engaged would pass constitutional muster. Put in specific terms, the parties and the District Court focused their attention on how this public high school football coach could react, consistent with the Establishment Clause, when members of his team decide to initiate voluntary prayers at a pre-game meal attended only by players, staff, players' parents, and invited guests, and in the locker room before a game where only players and coaches are present.

Borden, for his part, represented that, whatever had gone before, he would no longer pray with the team, move his lips, join his hands with the players, or even close his eyes. Rather, the two silent actions in which he wished to engage — bowing his head and taking a knee when the team decides to pray — are to show his "personal respect" for his players and "respect for what this game entails and what they do to go out there and play and give it their all." The defendants had no problem with that. As Superintendent Magistro put it, "if the courts determine that [Borden] taking a knee, bowing his head, is appropriate, that's fine. He can do that. I

think that's what this is all about." Again, "[i]f the courts come down and say Borden can bow his head, bend his knee, jump on the table, I am going to allow it." The defendants' briefs before the District Court on the cross-motions for summary judgment continued that theme. One put it this way: "If this Court were to find plaintiff s actions do not implicate the Establishment Clause, then regardless of what Constitutional right plaintiff seeks relief under . . . he would be entitled to participate in voluntary, non-disruptive student prayers."

Suffice it to say that when they were before the District Court, the parties were in good faith trying to avoid an Establishment Clause problem, with defendants explicitly agreeing to abide by the District Court's decision. But defendants did not do so. Rather, now armed with new counsel, they filed an appeal, creating before us a legal landscape that bears little or no resemblance to what went on before the District Court and surely causing the temperature of this litigation to soar.

Given my druthers, I would hold defendants to their word and would not entertain, as my distinguished colleagues have so generously entertained, the new issues and arguments raised on this appeal.[32] I will not, however, tarry to push the

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[32] I would find, for example, that defendants have waived the argument that numerous pedagogical reasons justified the directives and not just fear of litigation and the argument that Borden has no

(continued...)

proverbial waiver rock uphill as to all of those issues and arguments because I cannot disagree, nor does Judge McKee, with the bottom-line conclusions of Judge Fisher's superb lead opinion that "the guidelines and the Board's statement were not unconstitutional on their face, were not unconstitutional as applied to Borden, and in fact, were necessary for the School District in order to avoid Establishment Clause violations." These conclusions are "threshold question[s] necessary to a proper analysis of the parties' [Establishment Clause] arguments," before us and so, even if not adequately raised before the District Court, it is appropriate that we consider them. See *Tenafly Eruv Ass'n Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002).

I write separately, however, to express my view that whether or not Borden's past prayer activities with the team signaled an unconstitutional endorsement of religion — and I have little doubt that they did — a reasonable observer would not conclude that the "respectful display" he proposes would violate the Establishment Clause. The lead opinion concludes, in its additional, albeit unnecessary, "hold[ing]," that that display would "cross the line." It does so, however, as does Judge McKee's concurring opinion, by having the reasonable observer look only at Borden's twenty-three years of history with the team's prayers and the context of the display

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constitutional rights which would limit defendants' exercise of their discretion.

he proposes.[33] Yet a reasonable observer would not only have knowledge of that history, but would know of all that has taken place leading up to and during this litigation and know that Borden, under oath, has represented what he will and will not do and that he merely wishes to show respect for his players when they pray. A reasonable observer would have no reason to believe that Borden was lying.

Moreover, given the limited number of attendees at the pre-game meal, it is fair to say that a reasonable observer of a prayer before that event would be a player, coach, parent, or invited guest, and a reasonable observer when the team takes a knee for a pre-game prayer in the locker room would be a player or a coach, just as in *Santa Fe* the observer was "an objective Santa Fe High School student." *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Thus, if and when in the future a player decides to initiate prayer, the reasonable observer would know, given Borden's representations, that he did not ask for a prayer; did not select someone to say

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[33] Judge McKee has included in his concurring opinion a picture of unknown date that is not in evidence in this case and thus, in my view, not appropriately considered by us. Having lost that battle, I agree with Judge Fisher's assessment of the picture and what more would be needed before a reasonable observer could reach the conclusion that Borden was, in fact, praying, a conclusion reached by Judge McKee based on the picture alone. *See* Lead Op. at n.25.

a prayer; did not monitor the content of the prayer; did not provide a means for broadcasting the prayer; did not join his hands with anyone; and did not mouth the words of the prayer, or say it aloud, or otherwise do anything to put the imprint of the state on the prayer. A reasonable observer would simply see Borden bow his head or take a knee in a silent, unobtrusive sign of respect for the private choices made by individual players who are constitutionally permitted to choose to engage in religious activities. See, *e.g.*, *Zelman v. Simmons Harris*, 536 U.S. 639, 649-55 (2002); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251-52 (1990); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 531 (3d Cir. 2004).

My colleagues and I do not disagree that bowing one's head and taking a knee can be signs of respect; indeed, Judge Fisher "would likely" find, as would I, *no* endorsement of religion were a football coach, who had never engaged in prayer with his team, to bow his head or take a knee while his team engaged in a moment of reflection or prayer. Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk

away.[34] Any such requirement would evidence a hostility to religion that no one would intend.

This is a difficult and close case, complicated by the fact that; unlike the vast majority of Establishment Clause cases which are brought by plaintiffs complaining of a state's actions, this case was brought by an employee of a state complaining about pre-emptive action taken by the state in its attempt to avoid an Establishment Clause problem. With this litigation hopefully nearing its end, one also hopes that those involved will move forward as a team for the benefit of the young people who look to them for guidance and support.

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[34] One wonders how a court can dictate, beyond a certain point, what response is permissible, much less how a response would be enforced. Defendants told the District Court that Borden can bow his head, but he cannot do "a pronounced bowing of the head." What is "pronounced," and who would decide that question? As defendants also told the District Court, "The district does not have thought police, and we certainly don't have bow police."

APPENDIX B

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Attorney for Plaintiff, Marcus A. Borden

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARCUS A. BORDEN,

Plaintiff,
vs.

EAST BRUNSWICK SCHOOL DISTRICT, EAST BRUNSWICK SCHOOL BOARD AND DR. JO ANN MAGISTRO, in her capacity as Superintendent of East Brunswick Public Schools,

Defendants.

Civ. A. No. 05-5923 (DMC)

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DOCUMENT ELECTRONICALLY FILED

THIS MATTER having been opened to the Court by way of a motion for summary judgment filed on behalf of Defendants by Scarinci & Hollenbeck, L.L.C. (Martin R. Pachman, Esq. appearing) and a cross-motion for summary judgment filed on behalf of Plaintiff by Ronald

J. Riccio, Esq., and the Court having considered all documents submitted in support of and in opposition to the respective motion and cross-motion, and good cause having been shown;

IT IS on this 25 day of July, 2006;

ORDERED, ADJUDGED and DECLARED that:

1. Defendants' motion for summary judgment be and the same is hereby denied in accordance with the Opinion of this Court, on the Record, 2006; July 25;

2. Plaintiff's cross-motion for summary judgment be and the same is hereby granted in accordance with the Opinion of this Court, on the Record, 2006; July 26;

3. As the prevailing party, Plaintiff is awarded costs and counsel fees as against Defendants. Counsel for Plaintiff shall submit an appropriate application setting forth the amount of costs and counsel fees to be awarded within 20 days of the date of this Order.

_____

Hon. Dennis M. Cavanaugh, U.S.D.J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARCUS A. BORDEN Plaintiff, v. EAST BRUNSWICK SCHOOL DISTRICT, EAST BRUNSWICK SCHOOL BOARD, AND DR. JO ANN MAGISTRO, in her capacity as Superintendent of East Brunswick Public Schools, Defendants.	:	Civil No. 05-5923 (DMC) TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey
July 25, 2006

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.

Reported by
CHARLES P. MCGUIRE, C.S.R.
Official Court Reporter

* * *

THE COURT: Well, this case has taken a lot of time and a lot of effort; and, hopefully, we'll resolve it.

As stated, it's the Plaintiff's view that his First and Fourteenth Amendment rights to free speech, privacy, persona autonomy, freedom of association, and academic freedom have been and continue to be violated as a result of the Directives set forth by the Superintendent and the Board, as well as the New Jersey constitutional rights of liberty and free speech.

According to the Plaintiff, the activity he wishes to engage in and is now prohibited from engaging in include the silent bowing of his head and/or taking a knee. He wishes to engage in these acts during the 2006 East Brunswick High School football season while his players say player-led, player-initiated and player-composed, voluntary, non-denominational pregame prayers. As such, the Plaintiff by his complaint seeks the following declaratory and injunctive relief:

First, a declaratory judgment declaring that the guidelines and the Board's October 20, 2005 public statement are unconstitutional, in violation of the New Jersey State Constitution, first count, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, second count, and are therefore null and void;

Secondly, that preliminary and permanent injunctive relief enjoining the Defendants, their officers,

agents, servants, employees, attorneys, affiliates and those persons in active concert of participation with them from actively enforcing the guidelines or Directives, the Board's October 20th public statement, or taking any action by way of complaint or otherwise against Coach Borden by virtue of his acts of demonstrating respect for the team prayers by silently bowing his head and taking a knee during these prayers or activities;

And, third, vacating the guidelines from Superintendent Magistro and the Board's October 20 public statement insofar as both, individually or collectively, threaten action against Coach Borden for demonstrating respect for the team's prayers by silently bowing his head and taking a knee.

Plaintiff submits by way of his Complaint that for more than 25 years, the East Brunswick public high school football team has engaged in two voluntary pregame prayers (collectively, "The Team Prayers"). The first is to say grace before every pregame team meal, and the second voluntary team prayer in the locker room while "taking a knee" as a team unit prior to the start of the game.

Defendants contend that if they were to allow the Plaintiff to "participate" in prayer with the student members of the football team, his actions and therefore the school district's actions would be in violation of the Establishment Clause. They argue that Supreme Court precedent dictates that the Court apply the Endorsement Test, the Coercion Test and the *Lemon* Test, and that regardless of which test is applied, Plaintiff's proposed participation in student

prayer is impermissible under the Establishment Clause.

Plaintiff, on the other hand, argues that he wishes to partake in certain symbolic conduct, i.e., bowing his head and "taking a knee," as a sign of respect and deference to his players, who wish to engage in prayer. He claims that he does not intend to pray with his players, nor to lead them in prayer; that his players have voluntarily decided what they want to say. Furthermore, he submits that his symbolic conduct is part of being a football coach and is premised upon purely secular values and beliefs. Plaintiff's main argument is that the October 2005 directive violates his constitutional right to free speech because he wishes to engage in nonverbal conduct of symbolic expression of a secular nature, which is protected under the First Amendment. He also claims that Defendants are mistaken in their interpretation of the Establishment Clause, and that Plaintiff's conduct does not, in fact, violate the Establishment Clause.

The Establishment Clause of the First Amendment forbids the enactment of any law or practice "respecting an establishment of religion." The case law developed under the Establishment Clause has grown very complex, and there seems to exist a case for and against each proposition furthered by any party. What is certain, however, is that the Supreme Court has set forth three tests for determining whether the Government has violated the Establishment Clause. The most well-known of these tests is the *Lemon* Test, which states that a government practice is constitutional if, one, it has a secular purpose, two, its primary effect neither

advances nor inhibits religion, and, three, it does not excessively entangle government with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Second is the Coercion Test, applied by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992), where the Court considered school-sponsored religious activity in terms of the coercive effect that the activity has on students. Finally, the Supreme Court has applied what is known as the Endorsement Test, which asks whether a fully informed hypothetical observer would view a government practice as either endorsing or disapproving of religion. *See County of Allegheny v. ACLU*, 492 U.S. 574, 594 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984).

It is well established that the practice of having a prayer recited daily in a classroom, even if non-denominational, is unconstitutional. *Engel v. Vitale*, 360 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992). Other courts have also held that all school-sponsored prayer and religious exercises are unconstitutional. *See School District of Abington Township v. Schempp*, 374 U.S. 202 (1963). Although participation in both the *Engel* and *Schempp* cases was 'voluntary,' the Supreme Court found that this fact was without constitutional significance. Courts in other Circuits have analyzed pregame prayer and found unconstitutional an "equal access" plan under which student volunteers could recite prayers of their own choosing as part of a pregame ceremony. *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989); *Accord, Doe v. Aldine I.S.D.*, 563 F. Supp. 883 (S.D. Texas 1982).

Typically in a case of this sort, a student or parent has challenged the conduct, and the school district finds itself in the position of defending itself and its practices. Here, however, we are faced with a situation where the school district has taken pre-emptive action so as to avoid what they view to be a possible Establishment Clause problem. At first, due to the fact that the Supreme Court repeatedly applies the *Lemon* test when a question of Establishment Clause jurisprudence arises, I thought that it was important for the Court to consider the Plaintiff's proposed actions under the *Lemon* formula. However, the problem I have with that is that we are not here faced with the question of whether Mr. Borden and his team should be allowed to engage in prayer. Rather, Mr. Borden is merely' asking the school district to allow him to remain present while the team says grace at the pregame meal and to take a knee and bow his head with his team before the game. As such, I agree with the Plaintiff's argument that the Establishment Clause test most applicable to the situation at hand is the Endorsement Test, which asks whether a fully informed, hypothetical observer would view a government practice as either endorsing or disapproving of religion as that is often applied by the 3rd Circuit. *See Freethought Society v. Chester County*, 334 F.3d 247 (3rd Cir. 2003).

The Endorsement Test requires a court to ask whether a reasonable/objective observer of Borden's conduct would consider his "head bowing" or "taking a knee" to be an example of the government endorsing or disapproving religion.

First, I think that the bowing of one's head to a reasonable observer does not indicate endorsement of religion. People bow their heads frequently as a sign of respect - for example, government and world leaders call for moments of silence as a sign of respect, a practice wherein people inevitably bow their heads.

I understand Plaintiff's argument that he wishes to take a knee as a sign of respect to his team, who are taking a knee of their own accord, and I think that this possibly could be looked at with some religious overtones. However, I have read Plaintiff's submissions, and perhaps in the history of football, taking a knee does not have the significance typically associated. Borden distinguishes taking a knee from the act of kneeling so as to say a prayer - he claims that taking a knee is "not praying, nor can it be compared in any way to kneeling to pray." (Borden Dec. Paragraph 15). Rather, Borden posits that "it is a time-honored football tradition. It is a demonstrative way of showing team solidarity, team cohesion, and team seriousness of purpose." (*Id.*) In that vein, the pregame traditions of the East Brunswick High School football team should be thought of more as invocations, which have been held permissible and of secular purpose, rather than as prayer. *See Marsa v. Wernik*, 86 New Jersey 232, 248 (invocations at borough council meetings serve as a "call to conscience" and create "an atmosphere conducive to open exchanges, cooperative participation, and tolerant and conscientious deliberations of all those present . . .").

It is important to keep in mind that Coach Borden is not asking the Court to allow him to lead his team in prayer but rather to bow his head and take a knee as part of a pregame secular football tradition. We cannot just look at this case in a vacuum. Tradition plays a part, and the overall actions and responsibilities of a football coach should be considered. Plaintiff argues, and I agree, that there is a place for team spirit, team unity, and team family, if you will. For the coach, who is looked at as the glue to hold all of this together and foster team spirit, to not be allowed to participate in these traditions even in the passive way just doesn't seem right. In fact, to not be able to acknowledge these pregame traditions in even a passive participation would or could be looked at as disrespectful to and undermining the sense of the team mentioned above.

With respect to the coercion of players and the fear that a coach that participates may have an adverse effect on those players who choose not to pray or otherwise take part in pregame traditions, whether the coach passively participates by taking a knee, silently bowing his head as the students pray or otherwise conduct themselves really would make little or no difference in my view, since if it was a coach's intention to retaliate against a student who does not wish to participate, the coach could find this out anyway. Accordingly, the coach's passive participation in otherwise student-initiated and -led prayers and traditions are of no moment.

Thus we come down to what is considered participation. What is the coach to do? Should he leave the room? Turn his back? Stand at attention

and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head to be considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

I don't think it's fair to ask a coach to do nothing. I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

I believe to preclude the Plaintiff from such an action would be a violation of his rights. I believe the Directives as stated are overbroad and vague. To threaten the Plaintiff with insubordination if he is to participate places him in an untenable position.

I find that the Plaintiff's request to bow his head in silence and take a knee do not violate the Establishment Clause of the Constitution.

I find, further, that the Defendants' directive regarding the Plaintiff's nonparticipation is over broad and vague, and violates the Plaintiff's First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, as well as New Jersey's constitutional rights to liberty and free speech.

Accordingly, since there are no issues of material fact left in dispute, as a matter of law, I deny the defendants' motion and grant the Plaintiff's motion for summary judgment.

An appropriate order will follow.

Thank you.

(Matter concluded)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3890

MARCUS A. BORDEN

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; Dr. JO ANN MAGISTRO, in her capacity as Superintendent, School District of the Township of East Brunswick,

Appellants

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 05-cv-05923)
District Judge: Honorable Dennis M. Cavanaugh

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, *Circuit Judges*.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellee having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision

not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en bane, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher,

Circuit Judge

Dated: May 15,2008

PDB/cc: All Counsel of Record

115

(4)

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

No. 08-482

In the Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; AND DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

For 23 years, Marcus Borden sponsored and led official team prayers as head football coach at East Brunswick High School. In 2005, when parents complained, the superintendent directed him to stop. Borden immediately resigned, explaining that he was unwilling to coach without joining students in team prayer. Ten days later, he rescinded his resignation; and five weeks after that, he filed suit. Alleging in his Complaint that he would no longer lead the team prayers or say them aloud, he claimed constitutional rights to continue bowing his head during prayers at team dinners and 'taking a knee' for prayers before games. He then directed the team to vote on whether to continue the prayers, letting the students know that he needed the results for his lawsuit.

The Third Circuit unanimously held that Borden lacks any right to disobey the School District's directive, and accordingly, he has no valid claim, irrespective of whether his desired conduct would violate the Establishment Clause. The panel members divided over the hypothetical question whether the Establishment Clause would bar a coach with no history of involvement in student prayers from bowing and taking a knee during voluntary, student-initiated prayers. Taking no issue with the Third Circuit's unanimous holding that he lacks any right to disobey the School District's directive, Borden presents only the non-dispositive, hypothetical question that divided the panel.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION 15

I. The Question Presented In The Petition Can Have No Effect On The Outcome Of This Case 16

II. The Decision Below Creates No Circuit Split And Engenders No Doctrinal Confusion 17

A. There is no conflict over whether context matters in Establishment Clause cases ... 17

B. There is no split of authority over whether nonparticipation in prayer constitutes religious animus 21

C. There is no doctrinal confusion about how the endorsement test applies to this case . 22

III. The Decision Below Is Plainly Correct And Does Not Warrant Further Review 24

A. The Third Circuit correctly held that Borden has no right to disobey the District's policy 24

B. The Third Circuit correctly determined that Borden's conduct violates the Establishment Clause 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases:

ACLU of N.J. v. *Schundler*,
168 F.3d 92 (3d Cir. 1999) 20

Ams. United for Separation of Church & State v. *City of Grand Rapids*,
980 F.2d 1538 (6th Cir. 1992) 23

Bd. of Dirs. of Rotary Int'l v. *Rotary Club*,
481 U.S. 537 (1987) 24

Bd. of Educ. v. *Grumet*, 512 U.S. 687 (1994) 18

Bd. of Educ. v. *Mergens*, 496 U.S. 226 (1990) 21

Boy Scouts of Am. v. *Dale*, 530 U.S. 640 (2000) ... 24

Chandler v. *James*, 180 F.3d 1254
(11th Cir. 1999), *vacated and remanded*,
530 U.S. 1256, *reinstated*, 230 F.3d 1313
(11th Cir. 2000) 21, 22

Connick v. *Myers*, 461 U.S. 138 (1983) 16

Doe v. *Duncanville Indep. Sch. Dist.*,
70 F.3d 402 (5th Cir. 1995) 5, 21, 22

Doe v. *Small*, 964 F.2d 611 (7th Cir. 1992) 23

Edwards v. *Cal. Univ. of Pa.*,
156 F.3d 488 (3d Cir. 1998) 16, 24

Freedom from Religion Found., Inc. v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) 23

Givhan v. *W. Line Consol. Sch. Dist.*,
439 U.S. 410 (1979) 16

TABLE OF AUTHORITIES — Continued

Page(s)

Good News Club v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) 23

Granzeier v. *Middleton*, 173 F.3d 568 (6th Cir. 1999) 20

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 25

Grossman v. *S. Shore Pub. Sch. Dist.*, 507 F.3d 1097 (7th Cir. 2007) 21, 25

Holloman v. *Harland*, 370 F.3d 1252 (11th Cir. 2004) 21, 22

Ingebretsen v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) 21, 22

Kong v. *City & County of S.F.*, No. 00-15261, 2001 WL 1020102 (9th Cir. Sept. 5, 2001) 23

Lawrence v. *Texas*, 539 U.S. 558 (2003) 25

Lee v. *Weisman*, 505 U.S. 577 (1992) 19, 22, 27

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 13, 18

Marchi v. *Bd. of Coop. Educ. Servs.*, 173 F.3d 469 (2d Cir. 1999) 25, 26

McCreary County v. *ACLU of Ky.*, 545 U.S. 844 (2005) 18, 22, 23

McGowan v. *Maryland*, 366 U.S. 420 (1961) 18

Metzl v. *Leininger*, 57 F.3d 618 (7th Cir. 1995) . . . 20

TABLE OF AUTHORITIES — Continued

Page(s)

Pickering v. *Bd. of Educ.*,
391 U.S. 563 (1968) 10, 11, 16, 25

Roberts v. *U.S. Jaycees*, 468 U.S. 609 (1984) 24

Rusk v. *Crestview Local Sch. Dist.*,
379 F.3d 418 (6th Cir. 2004) 23

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U.S. 290 (2000) ..... *passim*

Selman v. *Cobb County Sch. Dist.*,
449 F.3d 1320, 1323 (11th Cir. 2006) 22

Tenn. Secondary Sch. Athletic Ass'n v.
Brentwood Academy, 127 S. Ct. 2489 (2007) .. 25

Constitutional Provisions:

U.S. Const. Amend. I ..... *passim*

Statutes:

Equal Access Act, 20 U.S.C. §§ 4071–4074 ... 21, 22

BRIEF FOR THE RESPONDENTS IN OPPOSITION

This case involves a public-high-school football coach's extravagant claim of a constitutional right to violate a school policy designed to avoid faculty entanglement in student prayer. The School District specified how its faculty should interact with students in class and at school activities. Borden disagreed. But he does not challenge the Third Circuit's unanimous — and case-dispositive — ruling that he lacks any right to disobey. Rather, he asks this Court to review the question whether the School District *would have* had an Establishment Clause justification to override that right *if* it had actually existed — a determination that the court below expressly recognized to be unnecessary to deciding the case.

The question that the petition purportedly presents is irrelevant to the disposition of this case for another reason, as well. Borden asks this Court to ignore the history and context of his actions, and to decide, in a vacuum, whether a teacher or coach with no previous involvement in student prayer may make "secular gestures of silent respect in response to * * * student-initiated religious acts." Pet. i. That question bears no relation to the facts of this case.

STATEMENT

For 23 years, Borden "orchestrated" and "led" official team prayers. Pet. App. 48a. When parents complained, the School District directed him to stop. This action is his challenge to the District's authority to issue that directive.

1. The East Brunswick High School holds team meals in the cafeteria after school on game days. Attendance is mandatory for the players. Cheerleaders, other students, and parents also attend.

At every pregame meal since becoming coach in 1983, Borden has directed the players and other attendees to stand for formal team prayers. For many years, he invited the local Presbyterian minister (or occasionally, early on, a rabbi), to deliver those prayers. In approximately 1997, however, the high-school athletic director told him that doing so was impermissible. So Borden had the minister write an official team prayer, which Borden "selected seniors on the team to recite." Pet. App. 49a. Starting in 2003, Borden took it upon himself personally to lead the prayer at the first pregame meal each fall, while continuing to appoint seniors to do so for the other games.

Borden also led a separate prayer in the locker room before every game during his entire tenure as coach. After the players suited up, he directed them to 'take a knee' and gather around the blackboard to review strategy. Then, just before the players took the field, he got down on his knee with the team, and personally led the team in prayer.

2. Jo Ann Magistro, the superintendent of schools, first learned about the prayers a few weeks into the 2005 football season, when two cheerleaders' parents called, complaining that their daughters became uncomfortable at a pregame dinner when Borden told everyone to stand, bowed his head, and had a student lead a prayer invoking Jesus. Magistro then learned

that other students and parents had complained the previous year, and that Borden had been told to cease his mealtime-prayer practice but had not done so.

A few days later, a "'crying and overwrought'" mother of a football player complained to Magistro that her son was both upset by the prayers and afraid that Borden would appoint him to lead one. Pet. App. 63a (McKee, J., concurring) (quoting C.A. App. 451). "When Magistro asked why her son participated in the team prayers despite his discomfort, the mother responded that he 'was fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time.'" *Ibid.*

Magistro had the athletic director tell Borden to stop leading mealtime prayers. (She did not yet know about the locker-room prayers.) But Borden continued them anyway, and, according to a parent, "told the students that if they felt uncomfortable during the prayer, they could wait in the restroom until it was over." Pet. App. 8a. Yet more parents complained, including one who had consulted a lawyer and was threatening litigation.

3. Magistro met with Borden, told him of the parents' complaints, and asked him to describe the mealtime prayers. Borden explained that, when the food was ready, he would ask everyone to stand, and would then select a student to deliver a prayer. He went on to tell Magistro that he also led prayers in the locker room.

Magistro included the School District's attorney in the meeting by teleconference, so that he could clarify

the rules regarding prayer in school; and together they instructed Borden to stop conducting team prayers. At the end of the meeting, Borden said that he did not know how he was going to respond to that directive because obeying would mean that "the parents win." C.A. App. 160.

That same day, the attorney prepared written guidelines on school prayer:

> 1. Students have a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day, provided that:
>
> A. The activity is truly student initiated; and
>
> B. The prayer activity does not interfere with the normal operations of the school district.
>
> This would mean that * * * if student athletes on their own decide to hold a prayer huddle before a game, after a game, or during half-time, they have a right to do so.
>
> 2. Neither the school district nor any representative of the school district (teacher, coach, administrator, board member, etc.) may constitutionally encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-sponsored setting, including

> classes, practices, pep rallies, team meetings, or athletic events.
>
> 3. Representatives of the school district, as referenced above, cannot participate in student-initiated prayer. That very issue was decided by the Fifth Circuit Court of Appeals in a decision cited with approval by the United States Supreme Court and is, therefore, the operative law of the land at this time. To quote the Court, "If while acting in their official capacities (school district) employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion," and such conduct was prohibited.

C.A. App. 220-21 (quoting *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 n.4 (5th Cir. 1995)).

That afternoon, Magistro sent Borden the guidelines, acknowledging Borden's disagreement but instructing him to comply. She invited him to contact her with questions, but he never did.

4. Borden did not show up for the football game that evening. Nor did he return Magistro's or the athletic director's telephone calls asking where he was. Later that night, he sent the athletic director an e-mail announcing that he was resigning as coach, "effective immediately." C.A. App. 224.

Ten days after resigning, Borden, through his attorney, rescinded his resignation. He explained that he had quit because he was unwilling to coach if he could no longer pray with students before games, but that he was now prepared to resume his coaching duties, and to "adhere to the District's directive to him," while preparing to sue. C.A. App. 228-229. At a school-board meeting a few days later, the board president formally recognized Borden's right to disagree with the school-prayer policy, but not to disobey it.

Meanwhile, word got out that some cheerleaders had complained about Borden's prayers. The cheerleading squad immediately became the object of harassment and ridicule at athletic events. And the District's "student internet message boards were bombarded with posts" (Pet. App. 13a n.3) attacking "Jewish Cheerleaders who suck," on the apparent assumption that the two Jewish members of the squad had been the ones to complain. These are some of the posts:

- "Madeline Witchell and Debbie Elson...you guys thought u dint have friends to begin with...now ur really f**ked...I will make sure that I make the rest of the year a living hell for both of u"
- "First they crucify Jesus, then they get Borden fired...what the hell. Jews gotta learn to stop ruining everything cool."
- "The jew is wrong. Borden is right. Let us pray."
- "lets have a rumble...jews vs. christians....."

- "F * * K THE JEWS"
- "d**n jews..then you wonder why hitler did what he did back in the day"
- "MAYBE if [Borden] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law...ehhh maybe not! * * * just suck it up if u don't fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY AND EAT ME ook?"
- "Heil Hitla!!! seig heilll."

C.A. App. 457-495; Pet. App. 67a-68a. Students who defended the cheerleaders or suggested that Borden's actions might be inappropriate became victims of equally ugly racist, sexist, and homophobic slurs and threats. As a result, the superintendent received yet more complaints — including one from a local rabbi, who had also lodged a complaint with the county prosecutor.

5. Five weeks after rescinding his resignation, Borden filed suit, challenging the District's school-prayer policy as violating various state constitutional provisions and depriving him of federal due-process rights. Although contending that he has the right to continue leading team prayers, Borden nonetheless alleged that he would stop saying the prayers aloud. He expected that the players would continue the prayers regardless, because, he explained, they were longstanding school traditions; and he sought a

declaratory judgment that he has the right to continue bowing and 'taking a knee' for them.

That spring, while preparing for trial, Borden ordered the team's student captains to ask each of the other players whether to continue the prayers, and to report their responses to him:

> Please consult with the players and let me know whether the players wish to follow the same practices as last year regarding the player initiated and composed grace before pre-game meals and the pre-game taking of a knee in the locker room. Whatever the players decide to do is fine with me.
>
> Be sure to email me their response and let me know that you spoke with all the players on the roster.

C.A. App. 497. A couple of days later, Borden sent a follow-up directive:

> My lawyer keeps asking me for the results of your contact with the other players. He is trying to set up a trial date and ***he needs*** this information right away. You guys have to touch base with everyone by Monday so that I can fax him your email.

Id. at 498.

One of the student captains quickly responded:

> Coach Borden,
>
> > We talked to all of the players you asked about, and everybody agreed that we would like to continue our pregame prayer ritual. Hope this helps you out and sorry it took so long.

C.A. App. 498.

6. The School District sought summary judgment, arguing principally that its school-prayer policy does not violate Borden's free-exercise rights and is required by the Establishment Clause. Borden responded by denying that he was making any free-exercise claim. He argued that bowing and taking a knee for team prayer are not religious acts, but instead are secular coaching techniques essential for fostering team unity. Describing a football team as a "family unit," he contended that he, the coach, could not be a part of that family without bowing and taking a knee with the players for prayers. C.A. App. 72, 441-442.

Borden also cross-moved for summary judgment, contending that the District's policy violates his federal and state free-speech and academic-freedom "right and ability to be a coach, to do what coaches do," as well as his federal privacy, autonomy, and associational rights to interact with students; and that it constitutes "an 'old fashioned' liberty violation, reminiscent of the Middle Ages, by which [his] bodily movements have been restrained by government as if he is chained and shackled." C.A. App. 25; Borden's Summ. J. Opp'n 35. He also argued that the policy is vague and overbroad.

The District responded principally by arguing that Borden's conduct violates the Establishment Clause, and that his rights are outweighed by its interests under the *Pickering* balancing test. See *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968).

7. In an unpublished, oral ruling from the bench, the district court granted summary judgment to Borden on virtually all his claims. Although acknowledging that "an Establishment Clause violation would occur if the coach initiated and led the [prayers]," the court found that (a) silently bowing and taking a knee for the prayers are not violations; (b) the District's policy is vague and overbroad; and (c) the policy violates Borden's "First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, as well as New Jersey's constitutional rights to liberty and free speech." Pet. App. 86a. The court did not rule on Borden's privacy or autonomy claims.

The court rejected the School District's argument that Borden's conduct must be judged in light of his 23-year history of initiating and leading team prayers. C.A. App. 9-10. The court also refused to consider the constitutional implications of the team vote, excusing it as a litigation strategy. *Id.* at 8-9. And because 'taking a knee' in football "does not have the [religious] significance typically associated" with kneeling for prayer, the court held that Borden's taking a knee *for prayer* is simply "a sign of respect for his players' actions and traditions." Pet. App. 84a, 86a. Thus, the district court "[took] the Plaintiff at his word as to what he wants to do," and treated his promise about

his future conduct as the only fact on which the case turns. C.A. App. 9.

8. The court of appeals (per Judge Fisher) reversed, unanimously holding that the school-prayer policy is not unconstitutional, either on its face or as applied. Pet. App. 21a-43a; *id.* at 72a (Barry, J., concurring).

The court held that because the policy has numerous valid applications, it is not overbroad. Pet. App. 22a-24a. Because it clearly describes the prohibited conduct, it is not unconstitutionally vague. *Id.* at 25a-26a.

The court then rejected Borden's free-speech claim, explaining that Borden's "silent acts of bowing his head and taking a knee are not [speech] on matters of public concern" under *Pickering*. Pet. App. 37a. And because Borden conceded that bowing his head and taking a knee are pedagogical methods that he employs "pursuant to his official duties as a coach," his conduct is not protected by academic freedom. *Id.* at 36a n.13, 38a-39a. The School District had the lawful authority to "choose both how its students are taught and what its students are taught"; and Borden, while free to "voice his disagreement," has no right to disobey. *Id.* at 39a.

Next, the court held that public-school football teams are not constitutionally protected private, expressive associations; and "the relationship [between coaches and players] is typically not so close as to" give rise to rights of intimate association. Pet. App. 40a-41a. The panel also concluded that Borden suffered no

deprivation of due process because no fundamental rights were at issue. *Id.* at 42a-43a.

Finally, after unanimously and fully disposing of all Borden's claims to have constitutionally cognizable interests in disobeying the District's school-prayer policy, the court went on to consider whether the District would have had an Establishment Clause justification for overriding those interests if they had existed. Pet. App. 43a-56a. The court began by noting that its analysis was irrelevant to the outcome of the case: "[B]ecause Borden has no First Amendment right to his silent acts, we do not need to analyze the policy" to determine whether the District had adequate justification for it. *Id.* at 44a. "However, even if we applied that standard to the present case, we would arrive at the same result: the School District had a right to adopt its policy." *Ibid.*

The majority proceeded to conclude that, on the facts of this case, Borden's desired conduct would violate the Establishment Clause; and hence, the School District had no choice but to prohibit it. The court pointed to Borden's "significant history of pre-game prayers," including the facts that he personally organized and led those prayers for 23 years and that, "when [school] officials asked [him] to discontinue this conduct, he initially resigned from his position as coach of the team rather than continue as coach without engaging in the prayer activities." Pet. App. 50a. The court thus held that "[t]his history * * * leads to a reasonable inference that [Borden's] current requested conduct is meant to preserve a popular state-sponsored religious practice of praying with his team prior to

games." *Ibid.* (internal quotation marks and citations omitted).

The court rejected the claim that Borden's conduct must be viewed as wholly secular, explaining that, "although taking a knee in a huddle to discuss strategy is a gesture well known to football gurus as being part of the game," *Borden*'s practice is instead to take a knee for prayer. Pet. App. 52a n.21. Thus, "[a]lthough Borden believes that he must continue to [bow and take a knee] to demonstrate solidarity with his team, * * * [a] reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer," and "would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion." *Id.* at 53a-54a.

Having held that Borden's actions unconstitutionally endorse prayer, the court chose not to decide whether they also fail the coercion or *Lemon* tests. Pet. App. 46a. Nor did the court decide whether the team vote was unconstitutional — although it noted that the "argument is supported by the Supreme Court's decision in *Santa Fe*." *Id.* at 54a n.23.

9. Judge Fisher, writing for himself alone, went on to comment that, while "the conclusion we reach today is clear" because of Borden's history, it "would not be so clear" without that history. Pet. App. 54a-56a. Suggesting that "we would *likely* reach a different conclusion" for a coach "who had never engaged in prayer with his team," Judge Fisher listed a number of

factual considerations that would affect that determination on a case-by-case basis. *Id.* at 55a & n.25 (emphasis added).

Judge McKee wrote separately, disagreeing with Judge Fisher about the likely outcome for a coach who had no history of involvement in team prayer. Given the relationship between coach and players, Judge McKee explained, "a non-religious student * * * might feel subtle (albeit unintentional) coercion to participate in the ritual despite disagreement or discomfort with it." Pet. App. 60a. Judge McKee also opined that, on the facts of *this* case, "the players must have known how important prayer was to their coach — and no high school athlete would want to disappoint the coach, or * * * risk incurring the communal wrath that had been visited on the unfortunate cheerleaders." *Id.* at 62a. While "[a]ny player who held opposing beliefs should not have had to 'go along to get along' by silently participating in religious observances he disagreed with," "these players were put in the untenable position of either compromising any opposing [religious] beliefs they may have had or going on record * * * as opposing their coach and perhaps a majority of their team." *Id.* at 62a-64a. Judge McKee thus concluded that the School District had adopted a policy "to protect the First Amendment liberties of *everyone* in the school community." *Id.* at 65a-66a (emphasis in original).

Judge Barry, too, wrote separately. She agreed with the case-dispositive holding that Borden's claims fail because he has no affirmative rights against the District. Pet. App. 72a. But in light of Borden's promise

that he would no longer lead the team prayers, she opined that his desired conduct would not violate the Establishment Clause, despite the history underlying it. *Id.* at 73a.

REASONS FOR DENYING THE PETITION

Borden seeks review on whether public-school coaches "violate the Establishment Clause if they make secular gestures of silent respect in response to constitutionally protected student-initiated religious acts." Pet i. But because he does not seek review of the Third Circuit's unanimous holding that he lacks any affirmative rights to engage in that behavior, his claims necessarily fail — regardless of whether his conduct would violate the Establishment Clause if the School District chose to allow it. The question on which he seeks review can thus have no bearing on the outcome of this case.

In addition, the court's fact-bound alternative holding that Borden's conduct violates the Establishment Clause is correct and does not conflict with any decision of this Court or another court of appeals. As for how the Establishment Clause might apply to a coach with no history of involvement in student prayers, which is the only question on which Borden seeks review, the panel members' disagreement pertained to the possible resolution of hypothetical cases with different facts — and even then, only with respect to the court's alternative holding.

I. The Question Presented In The Petition Can Have No Effect On The Outcome Of This Case.

This case is not a typical Establishment Clause action in a public-school setting: No parent has sued to curtail the imposition of religious practices on a child. Rather, the School District enacted a policy governing staff conduct, which one staff member dislikes and wishes to disobey. The Establishment Clause came up solely as a justification for the policy.

That justification would be pertinent here only if school employees had some legally cognizable interest in disobeying the challenged policy. In the absence of such interests, the District has the right to make and enforce decisions specifying how its employees perform the functions it assigns to them. *Connick* v. *Myers*, 461 U.S. 138, 146 (1983) (under *Pickering*, "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable"); *Givhan* v. *W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-415 & nn.3-4 (1979); see, *e.g.*, *Edwards* v. *Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (Alito, J.) (rejecting challenge to jury instruction on balancing professor's rights against university's asserted interests "because, as a threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom").

Because Borden does not challenge the Third Circuit's unanimous holding that he has no legally cognizable interest in disobeying the school-prayer

policy, the question whether his desired conduct would be constitutional if the School District permitted it is purely academic: No interpretation or application of the Establishment Clause could change the outcome for Borden.

II. The Decision Below Creates No Circuit Split And Engenders No Doctrinal Confusion.

Even if the Establishment Clause issues raised by Borden's petition were squarely presented in this case, they would not warrant review.

Borden claims that, in applying the endorsement test, the court below erred by considering the history behind his actions. He asserts that history matters under the Establishment Clause for determining the purpose underlying a governmental action, but not for ascertaining the action's effect. But both this Court and the lower courts routinely consider history and context as an essential feature of *any* Establishment Clause inquiry; the purported circuit split does not exist.

When that argument for certiorari fails, so, too, do all Borden's others. Only by first cutting history and context out of the equation can Borden claim that bowing and kneeling simply show respect for student-initiated religious observances. And in all events, there is no doctrinal confusion that warrants clarification by this Court.

A. There is no conflict over whether context matters in Establishment Clause cases.

According to Borden, this Court has allowed consideration of history solely to determine un-

constitutional purpose under the *Lemon* test. Pet. 16-19. He is incorrect.

In fact, this Court has consistently refused to turn a blind eye to a challenged act's historical context in *any* Establishment Clause inquiry — whether relating to religious purpose, religious effect, religious endorsement, religious preference, or excessive entanglement. Thus, this Court considered the history surrounding the legislative creation of a school district in determining that the resulting statute afforded an unconstitutional religious preference. *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 703 (1994). It looked to the general "history of government grants" in determining that a particular grant would inevitably come with intrusive oversight, entangling government with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 621 (1971). It looked to the past iterations of a governmental display in determining that a new display was erected with a religious purpose. *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 866, 869-872 (2005). And it considered history in concluding that a Sunday-closing law had undergone sufficient changes since enactment to shed its religious character. *McGowan* v. *Maryland*, 366 U.S. 420, 432-434 (1961).

Most notably, this Court looked to history in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), to ascertain *both* the purpose for, *and* the effect of, a public school's football-prayer practice. It thus held that a reasonable student observer in the listening audience would consider the evolution of the prayer practice in evaluating the practice's current iteration, and would "unquestionably perceive the inevitable

pregame prayer as stamped with [the] school's seal of approval." *Id.* at 308-309.

The Third Circuit conducted the same inquiry here; and, on the specific facts of this case, reached the same conclusion. Explicitly declining to perform a purpose analysis, the court nonetheless determined that it "must consider all of [Borden's] prior prayer activities with his team, as the Supreme Court did in *Santa Fe*," not because past Establishment Clause violators are forever tarred with their violations, but because, "[b]ased on th[e] undisputed history," a reasonable observer would evaluate Borden's evolving practices in light of his "significant history of pre-game prayers," including his "initially resign[ing] * * * rather than continu[ing] as coach without engaging in the prayer activities." Pet. App. 49a-50a, 52a n.21. In concluding that the "history of Borden's prayers with the football team leads to a reasonable inference that his current requested conduct is meant to preserve a popular state-sponsored religious practice of praying with his team prior to games," what the court was actually deciding is that students would view Borden's prospective actions within the frame set by his past and current conduct; and in so doing, they would see the prayers as stamped with Borden's seal of approval, whether he intended them to be or not. *Id.* at 50a (quoting *Santa Fe*, 530 U.S. at 309 (quoting *Lee* v. *Weisman*, 505 U.S. 577, 596 (1992))) (internal quotation marks omitted).

The three court-of-appeals cases that Borden cites for the proposition that history is out of bounds all predate *Santa Fe*. If they conflicted with it, they would no longer be good law. But far from forbidding

consideration of history, all expressly looked to that factor. The courts simply concluded, on the facts before them, that the practices being challenged were not tainted by past violations. *Granzeier* v. *Middleton*, 173 F.3d 568 (6th Cir. 1999), rejected the claim that an "errant" county employee's one-time posting of religious signs relating to a holiday closing could forever after taint the county's *pre-existing* holiday-closing policy. It did so because a reasonable observer would weigh the county's venerable tradition and its secular purpose against the employee's recent misstep, and would infer a governmental endorsement of religion only for the year that the signs were displayed. *Id.* at 573-576. *Metzl* v. *Leininger*, 57 F.3d 618 (7th Cir. 1995), invalidated a state law requiring school closures on Good Friday, but suggested that a revised statute might withstand constitutional scrutiny if — but only if — the state could provide sufficient evidence that either the new statute or Good Friday itself had become sufficiently secularized. And *ACLU of New Jersey* v. *Schundler*, 168 F.3d 92 (3d Cir. 1999), rejected the argument that an earlier, unconstitutional holiday display necessarily tainted a later one because, given the "fine line-drawing" that holiday-display cases require, "the mere fact that city officials miscalculate and approve a display that is found * * * to cross over the line is hardly proof of the officials' bad faith." *Id.* at 105. In other words, the court refused to assume a continuing unconstitutional purpose where one likely never existed in the first place; and it declined to find a continuing religious endorsement based on a single impropriety that the government quickly and fully corrected.

B. There is no split of authority over whether nonparticipation in prayer constitutes religious animus.

Borden claims that the decision below mandates hostility toward religion, thus conflicting with decisions requiring neutrality. But public officials' nonparticipation in private religious exercises need not be hostile: Merely sitting on the sidelines does not show disdain for those in the huddle. No court has ever held to the contrary.

Neither this Court nor the lower courts have treated public officials' bare nonparticipation — failing to bow and kneel for prayer, and the like — as prohibited religious animus. Quite the contrary. They have uniformly recognized it as constitutionally permitted — if not affirmatively required.[1]

The petition incorrectly claims that other courts have barred only "active participation" while the decision here forbids mere passivity. Both Congress and the courts of appeals have routinely spoken only in

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[1] See, *e.g.*, *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) (because the Equal Access Act, 20 U.S.C. §§ 4071–4074, "expressly limits participation by school officials at meetings of student religious groups," it avoids "any risk of official state endorsement or coercion"); *Grossman* v. *S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007) (Posner, J.); *Holloman* v. *Harland*, 370 F.3d 1252, 1287 (11th Cir. 2004); *Chandler* v. *James*, 180 F.3d 1254, 1264 (11th Cir. 1999), *vacated and remanded*, 530 U.S. 1256, *reinstated*, 230 F.3d 1313 (11th Cir. 2000); *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996); *Duncanville*, 70 F.3d at 406 & n.4.

terms of "participation," without the modifier.[2] In any event, Borden is anything but passive: He bows his head and takes a knee expressly, and only, for prayer. See C.A. App. 108-109, 441; cf. *Lee*, 505 U.S. at 593 (even "the act of standing or remaining silent [is] an expression of participation in * * * prayer" sufficient to give rise to Establishment Clause concerns).

C. There is no doctrinal confusion about how the endorsement test applies to this case.

Borden invites this Court to use this case as an opportunity to refine or jettison the endorsement test. There is no occasion here for doing either.

Although the members of the panel below parted company over how the endorsement test might apply to a new coach with no history of involvement in student prayers, that hypothetical case bears no relation to the facts here. Accordingly, this case would be an exceedingly poor vehicle for resolving the disagreement.[3]

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[2] See Equal Access Act, 20 U.S.C. §§ 4071–4072; *Holloman*, 370 F.3d at 1287; *Chandler*, 180 F.3d at 1264-1265; *Ingebretsen*, 88 F.3d at 279; *Duncanville*, 70 F.3d at 405-406.

[3] As Judge Fisher recognized, a number of "additional facts" would have to be considered "[f]or a court to complete the required analysis." Pet. 55a-56a n.25; cf. *McCreary*, 545 U.S. at 867 ("under the Establishment Clause detail is key"); *Selman* v. *Cobb County Sch. Dist.*, 449 F.3d 1320, 1323 (11th Cir. 2006) (In Establishment Clause cases, "the devil is in the details. Facts and context are crucial and they, of course, must be determined from the evidence * * *.").

Borden also asserts that the lower courts have settled on different vantage points for the reasonable observer. Pet. 28-29. But all the cases to which he points, save one, concern religious displays.[4] The lone public-school case is *Rusk* v. *Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004), which involved the distribution of religious fliers to parents via their children's school mailboxes. Not only does that situation bear no relation to this one, but this Court has since specified the reasonable observer's vantage point for that type of case. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 117-19 (2001).[5] This Court has similarly specified the reasonable observer for situations like the one at hand, stating unequivocally that football-prayer practices are to be evaluated from the standpoint of a student in the listening audience. *Santa Fe*, 530 U.S. at 308. Borden does not deny that his practices should be evaluated through that lens. Thus, there is no circuit split or doctrinal confusion for this Court to resolve.

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[4] See *Kong* v. *City & County of S.F.*, No. 00-15261, 2001 WL 1020102 (9th Cir. Sept. 5, 2001) (unpublished); *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000); *Ams. United for Separation of Church & State* v. *City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992); *Doe* v. *Small*, 964 F.2d 611 (7th Cir. 1992).

[5] This Court has also recently clarified the reasonable observer's vantage point in religious-display cases. See *McCreary*, 545 U.S. at 866.

III. The Decision Below Is Plainly Correct And Does Not Warrant Further Review.

The decision below is a straightforward and manifestly correct application of settled law. It presents nothing requiring clarification or correction by this Court.

A. The Third Circuit correctly held that Borden has no right to disobey the District's policy.

There is no dispute that Borden seeks to bow and take a knee for team prayer in his official capacity as a public-school coach. Indeed, he candidly explains that he employs those activities as a teaching tool. For four decades, however, this Court and the lower courts have uniformly recognized that school districts, not individual employees, have the final say in choosing the curriculum and teaching methods for the schools they operate.

As then-Judge Alito put it for a prior Third Circuit panel, "'no court has found that teachers' [or coaches'] First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.'" *Edwards*, 156 F.3d at 491. Borden cites no contrary authority.[6]

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[6] As for Borden's freedom-of-association, privacy, and autonomy claims, the first failed because public-school football teams and their state-employed coaches are neither expressive associations, nor intimate ones. Pet. App. 40a-41a & n.15 (quoting *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000); *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 545-547 (1987); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 619-620 (1984)). The other two failed because state employees do not enjoy the same rights when

What is more, the School District would have had the authority to enforce its policy, even if Borden did have some legally cognizable interests at stake here, and it would not have had to show that Borden's conduct goes so far as to violate the Establishment Clause. The District has the right to prohibit teachers' conduct (even when constitutional rights may genuinely be at issue) if that conduct inhibits the District's ability to "operate [its schools] efficiently and effectively." *Tenn. Secondary Sch. Athletic Ass'n* v. *Brentwood Academy*, 127 S. Ct. 2489, 2495-2496 (2007) (internal quotation marks and citation omitted); accord *Pickering*, 391 U.S. at 572-573 (teacher's speech unprotected if it "in any way either impede[s] the teacher's proper performance of his daily duties in the classroom or * * * interfere[s] with the regular operation of the schools generally"). Fragmentation of the student body along religious lines, vituperative attacks on students who complain, and threats of litigation from parents all hamper school administration and harm the learning environment. Thus, whether or not Borden's desired conduct would violate the Establishment Clause, the District had strong reasons to regulate it.[7]

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performing their official public functions as they do when in their own homes. Pet. App. 42a-43a (explaining that Borden premises his privacy and autonomy claims on cases like *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Lawrence* v. *Texas*, 539 U.S. 558 (2003)).

[7] Cf. *Grossman*, 507 F.3d at 1100 (Posner, J.) ("Even if it is certain that there is no danger of a suit, the school authorities have a right * * * to control the policies of * * * [their] staff."); *Marchi* v. *Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir.

B. The Third Circuit correctly determined that Borden's conduct violates the Establishment Clause.

Although the Third Circuit was correct that there was no need here to decide the Establishment Clause question, it was equally correct in the answer that it gave: Borden's actions violate the Establishment Clause.

Under *Santa Fe*, the court below properly concluded that "[a] reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer," as well as his decision to "resign[] from his position as coach of the team rather than continue as coach without engaging in the prayer activities," and would therefore "conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion." Pet. App. 50a, 53a-54a.

Moreover, when Borden declares loudly and repeatedly that team prayer is vital to "team solidarity, team cohesion, and team seriousness of purpose" (C.A. App. 441), and then bows and takes a knee for the prayers at mandatory team events — after having personally spent two decades orchestrating and leading those prayers — he can hardly be said to be taking a

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1999) (Newman, J.) ("[W]hen [a school district] endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause.").

"hands-off" approach to student prayer (*Santa Fe*, 530 U.S. at 305). He has instead thrown the weight of his authority as coach behind the team prayers. It would be unreasonable to expect a student, upon seeing Borden take a knee and bow his head for team prayer, to get up, leave the huddle, and risk branding himself as not being a team player or a member of the coach's "family unit." Compare C.A. App. 72, 441-442, with *Santa Fe*, 530 U.S. at 311-312, and *Lee*, 505 U.S. at 593-596. And a non-anonymous team vote on whether to continue having prayers "does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority." *Santa Fe*, 530 U.S. at 304-305.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; AND DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

I. The Third Circuit's Establishment Clause Holding Is Outcome Determinative. 3

II. The Question Presented Raises an Unsettled Issue of National Importance that Deserves This Court's Attention. 6

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Bd. of Educ. of the Westside Cmty. Schs. v. Mergens,
496 U.S. 226 (1990) 7, 8, 9

Berckeley Inv. Group, Ltd. v. Colkitt,
455 F.3d 195 (3d Cir. 2006) 3

Doe v. Duncanville,
70 F.3d 402 (5th Cir. 1995) 10

Edward B. Marks Music Corp. v. Cont'l Record Co.,
222 F.2d 488 (2d Cir. 1955) 4

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 4

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 4

Santa Fe Indep. School Dist. v. Doe,
530 U.S. 290 (2000) 7

OTHER

11 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 56.14[d][i] (2008) 3

REPLY TO BRIEF IN OPPOSITION

Through his petition, Coach Borden showed that this case squarely presents the issue whether the Establishment Clause allows him to engage in silent gestures of respect when his team chooses to engage in prayerful activity. Pet. 12–15. We showed that this constitutional issue has generated conflict among the federal courts of appeals, Pet. 16–22, 23–28, and is one of recurring national importance, Pet. 28–33. Finally, we showed that this case squarely presents that issue for resolution by this Court. Pet. 29–31. Respondents' Brief in Opposition ("Opp.") calls none of this into question.

Instead, much of respondents' brief is devoted to an incendiary narrative designed to impugn Coach Borden's character and motives—in stark contrast to the briefing before the district court, when respondents credited Borden as an "honorable man." *Compare* Opp. 1–15 *with* R.15 at 4. Specifically, respondents invoke a series of unsubstantiated "facts" concerning alleged complaints about Coach Borden's practice of leading team prayers—activity that has ceased and that has nothing to do with the question presented here. Opp. 2–3. Critically, Coach Borden's complaint sought a declaratory judgment regarding his *prospective* silent gestures of respect, *not* his past conduct leading prayers. J.A. 67–83. As the respondents' allegations relate only to Coach Borden's *past* conduct of leading the team prayer, not his request for a declaratory judgment concerning his silent gestures of respect for

student-led prayer, they are irrelevant to the resolution of this case.[1]

With this underbrush cleared away, two salient points emerge. First, the Third Circuit's Establishment Clause holding is, in fact, essential to the outcome of this case, based on either a crucial concession by respondents in the district court or on the Third Circuit's reliance on that holding to reject certain of Coach Borden's affirmative claims. Second, as noted, this case presents unsettled issues of national importance that warrant this Court's intervention.

At bottom, this case reduces to a simple yet important question of nationwide significance: What can public school teachers, coaches, and staff do when students pray? According to respondents, the Establishment Clause basically requires a teacher to leave the room when his or her students engage in voluntary prayer—a position unsupported by this Court's jurisprudence.

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[1] Respondents also characterize Borden's conduct—specifically his email to the team co-captains prior to the 2006 season concerning whether the players intended to lead team prayer—as coercive. *See, e.g.*, Opp. 8–9, 26–27. Even if respondents' characterization is accepted—although neither the district court nor two of the Third Circuit panel members did so—that only goes to the merits of the Establishment Clause question presented rather than the suitability of this case to decide that question.

I. The Third Circuit's Establishment Clause Holding Is Outcome Determinative.

This case is an excellent vehicle for this Court to address petitioner's Establishment Clause arguments. First, respondents fail either to acknowledge or to address that *they*, through a concession made before the district court, made the Establishment Clause issue case-dispositive. Second, the Third Circuit's resolution of several of Borden's affirmative-rights claims expressly turned on its Establishment Clause holding.

1. The Establishment Clause issue is outcome-determinative in this case precisely because respondents made it so by conceding, in their summary judgment briefing in the district court, the validity of Coach Borden's affirmative claims if Coach Borden defeated their Establishment Clause defense. *See* Pet. 5–6 (quoting R.20 at 46), 7.[2] Respondents' concession was a binding judicial admission for purposes of summary judgment. *See, e.g.*, *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 (3d Cir. 2006) ("Judicial admissions are concessions in pleadings or briefs that bind the party who makes them.") (collecting cases); 11 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 56.14[d][i] (2008) ("Statements made in open court on the record or other representations to the court, including admissions in correspondence, may qualify as an admission for

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[2] Coach Borden anticipated respondents' Establishment Clause defense in his initial complaint seeking declaratory judgment, where he alleged that his requested acts could not be "reasonably perceived as government establishment of . . . religion." J.A. 72.

purposes of seeking summary judgment."). This Court has long recognized that such binding concessions before the district court cannot be retracted on appeal. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427–428 (2006) (relying upon government's concession before district court that plaintiff had established *prima facie* case for purpose of assigning burden of proof in connection with preliminary injunction); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 215 (1976) (plaintiff not permitted to revive abandoned theory of case on appeal).

Having conceded the merits of Borden's affirmative claims before the district court in favor of exclusive reliance on their Establishment Clause defense, respondents "cannot abandon [the] issue and then, after an unpalatable decision by the trial judge, on appeal, by drawing on the pleadings resurrect the abandoned issue." *Edward B. Marks Music Corp. v. Cont'l Record Co.*, 222 F.2d 488, 492 (2d Cir. 1955). Though they protest now that the Third Circuit ruled in their favor and denied Coach Borden's affirmative claims, respondents cannot escape that they conceded that Coach Borden was entitled to judgment on those claims if he prevailed against respondents' Establishment Clause defense. But instead, respondents cling to a characterization of the case that "bears little or no resemblance to what went on before the District Court," a time when "the parties were in good faith trying to avoid an Establishment Clause problem, with defendants explicitly agreeing to abide by the District Court's decision." Pet. App. 71a (Barry, J., concurring).

2. Even if the Third Circuit properly allowed respondents to retract their concession on appeal, the

court of appeals' Establishment Clause holding is still relevant to the outcome of this case. Respondents assert that the Third Circuit admitted that its Establishment Clause analysis is "irrelevant to the outcome of the *case*," Opp. 12 (emphasis added), but the Third Circuit's statements cited by petitioners only relate to Coach Borden's *free speech* claims. *See* Opp. 12 (citing Pet. App. 44a).

The Third Circuit's disposition of Coach Borden's freedom of association, expressive association, and due process claims relied on the court's Establishment Clause holding. *See* Pet. App. 41a (freedom of association claim: "[W]e find that the guidelines prohibiting him from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so. *See infra* Part III.C."); Pet. App. 41a–42a n.15 (expressive association claim: "As discussed in part III.C of this opinion, *see infra*, the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause. Therefore, we find any expressive association argument that Borden is attempting to make to be invalid."); Pet. App. 43a (federal due process liberty claim: "Borden has no interest—privacy, liberty, or otherwise—in behavior that violates the Establishment Clause."); Pet. App. 43a n. 16 (state due process claim: "[T]he balancing here has the same result as under federal constitutional principles because the public need—to prohibit Establishment Clause violations, which as discussed below, are present in this case—is so great. Therefore, Borden's [state due process claim] argument fails.").

Having linked the merits of the respondents' Establishment Clause defense with the merits of Borden's freedom of association and due process liberty claims, the lead opinion recognized that it was "necessary" to decide the Establishment Clause issue. *See* Pet. App. 45a n.17. As a result, there is no question that the Third Circuit's Establishment Clause holding is an outcome-determinative—and therefore reviewable—basis for its rejection of Borden's freedom of association, expressive association, and federal and state due process claims.

II. The Question Presented Raises an Unsettled Issue of National Importance that Deserves This Court's Attention.

1. Notwithstanding respondents' contrary assertions, Coach Borden's Establishment Clause challenges are not disposed of by any prior decisions of this Court. To support their claim, respondents both mischaracterize Coach Borden's arguments and misinterpret this Court's Establishment Clause jurisprudence.

a. At the outset, respondents assign to Coach Borden a straw-man argument: "According to Borden, this Court has allowed consideration of history solely to determine unconstitutional purpose under the *Lemon* test." Opp. 17–18. Coach Borden has never claimed that historical concerns have had no role in this Court's endorsement-test jurisprudence. *See* Pet. 16 ("[H]istory has long played a role in the endorsement test's 'reasonable observer' standard[.]"). Rather, Coach Borden objects to the *manner* in which his history was used by the Third Circuit—to constitutionally invalidate his subsequent course of

permissible secular conduct that a majority of the panel agreed did not, in any objective sense, constitute an endorsement of religion. *See* Pet. 17 ("[T]his Court has never relied upon history alone to invalidate a secular act by a state actor.")

Coach Borden showed that this Court's reliance upon history in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), does not dispose of this case. Though the Court certainly "looked to history" in *Santa Fe*, *see* Opp. 18, it did so only after determining the facial unconstitutionality of a school policy that "by its terms, invite[d] and encourage[d] religious messages." 530 U.S. at 306. Given that the policy at issue in *Santa Fe facially endorsed* religion, there was little question that it also would be *perceived* as an endorsement of religion by a reasonable observer. 530 U.S. at 306–307. But the *Santa Fe* Court used history only to corroborate the established unconstitutionality of the policy at issue; it never suggested that a religious history, standing alone, could transform a subsequent secular act, such as Borden's gestures, into a constitutional violation. *Santa Fe* cannot, therefore, support the interpretation respondents assign to it.[3]

b. In the petition, Coach Borden showed that under this Court's decision in *Board of Education v. Mergens*, the Establishment Clause neither requires nor permits

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[3] Indeed, even the specific holding respondents assign to *Santa Fe* is erroneous: the observation that a student would "'unquestionably perceive the inevitable pregame prayer as stamped with [the] school's seal of approval,'" Opp. 18–19, is part of the Court's discussion of the policy's *contemporaneous context*, not its prior history. *Compare* 530 U.S. at 307–308 (discussing context) *with id.* at 308–310 (discussing history).

the school district to forbid Coach Borden from showing silent respect towards his players' voluntary acts of student-led prayer. Otherwise, the situation Justice Kennedy warned of in his *Mergens* concurrence will have come to pass—literal application of the endorsement test will be used to require individuals such as Coach Borden to show affirmative hostility towards his players' religious expression. *See* Pet. 24–26 (quoting 496 U.S. 226, 261 (1990) (Kennedy, J., concurring)).

Respondents claim that because this Court has never treated "bare nonparticipation . . . as prohibited religious animus," petitioner's hostility concerns are misplaced. Opp. 21. Yet the record confirms that Coach Borden's nonparticipation actually alienated his players, chilling their free religious exercise rights. Pet. 4 (citing J.A. 169). The district court correctly recognized the absurdity that respondents' position creates, where the requirements of the Establishment Clause must hinge on the subtle distinctions between degrees of body language:

> What is the coach to do? Should he leave the room? Turn his back? Stand at attention and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

Pet. App. 85a–86a.

Further, respondents all but acknowledge that their view of the Establishment Clause *requires* Coach Borden to evidence active hostility towards his players' religious practices, by suggesting that he would violate

the Establishment Clause even if he were to merely stand silently near his players during a voluntary pre-game prayer. *See* Opp. 22 ("[E]ven 'the act of standing or remaining silent [is] an expression of participation in . . . prayer' sufficient to give rise to Establishment Clause concerns." (citation omitted)). Judge Barry, in her concurrence below, criticized the extremity of respondents' position:

> Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk away. *Any such requirement would evidence a hostility to religion that no one would intend.*"

Pet. App. 74a–75a (Barry, J., concurring) (footnote omitted).

This Court's prior decisions plainly do not dispose of Borden's petition. If anything, respondents' arguments before this Court only highlight the conflict between the decision below and this Court's holdings in *Mergens* and *Santa Fe*, as respondents make clear the lengths to which they demand Borden demonstrate active hostility towards his students' religious expression.

2. The need for guidance from this Court is critical given the uncertainty among the courts of appeals regarding the role history plays within a proper Establishment Clause analytical framework.

In an effort to minimize the conflict between the circuit courts, respondents either misunderstand or mischaracterize Coach Borden's claims. In the petition, Borden identified a series of decisions in which circuit courts recognized that objectively secular acts did not violate the Establishment Clause merely because they had a religious history. Pet. 20–22. By characterizing those decisions as fact-bound, Opp. 19–20, respondents disregard that those decisions establish a consistent legal rule—religious history does not, in and of itself, taint a subsequent permissible secular act. This legal rule of other circuits conflicts with the decision below.

In particular, respondents all but ignore *Doe v. Duncanville*, 70 F.3d 402 (5th Cir. 1995), the decision most factually analogous to—and legally in conflict with—the decision below. Though the *Duncanville* court upheld a school policy designed to avoid Establishment Clause concerns, the court made clear in its holding that nothing in the Constitution "compels [school] employees to make their non-participation [in student-initiated prayer] vehemently obvious or to leave the room when students pray[.]" *Id.* at 406. By contrast, respondents' brief makes clear that they believe the Third Circuit decision requires Borden to drastically separate himself from his students should they choose to pray. *See* Opp. 22. The decision below thus conflicts with *Duncanville*.

Such inter-circuit conflicts are manifestations of widespread confusion over application of the endorsement test. Pet. 28–29. Though respondents insist that this Court has resolved this confusion by providing context-dependent variations of the endorsement test's "reasonable observer" standard,

Opp. 23, their argument only proves petitioner's point: Though the endorsement test may have been originally intended to create a clear, unified, and consistent legal standard, it has failed to do so in practice.

Indeed, the disagreement within the Third Circuit panel serves as the most palpable example of circuit-level confusion in application of the endorsement test—a fact that respondents disregard. Contrary to the respondents' claim, the panel did not "part[] company" over the outcome of some remote hypothetical. Opp. 22. Rather, they disagreed over the core issue of whether the Establishment Clause forbade Coach Borden, *in this case*, from engaging in his requested acts of silent respect. *See* Pet. App. 72a ("I write separately, however, to express my view that whether or not Borden's past prayer activities with the team signaled an unconstitutional endorsement of religion . . . a reasonable observer would not conclude that the 'respectful display' he proposes would violate the Establishment Clause.") The result was a three-way split, as one judge found that Coach Borden's proposed conduct unquestionably *would not* violate the Establishment Clause, Pet. App. 72a, a second found that it unquestionably *would*, Pet. App. 56a–57a, and a third found that the conduct would be unconstitutional if engaged in by Coach *Borden* but not by some *other* coach, Pet. App. 53a–56a.

Were Establishment Clause jurisprudence as clear as respondents pretend, such wide disagreement could never have developed. This case thus presents the Court with the opportunity to provide much-needed clarity to a confused area of the law, to the benefit of public school educators and students throughout the country who are in need of this Court's guidance.

3. Finally, respondents make no serious effort to deny that the question raised by this case regarding the proper scope and application of the Establishment Clause is of national importance. Moreover, the efforts of *amici* demonstrate the importance of the Establishment Clause issue. Before this Court, several *amici* have joined petitioners in challenging the Third Circuit's Establishment Clause holding as being both legally flawed and endemic of confusion in the lower courts requiring this Court's attention. *See generally* Br. of Am. Cur. Southeastern Legal Foundation *et al.* Further, the American Football Coaches Association has articulated the importance of the Establishment Clause issue to coaches across the country, who encounter similar expressions of student-led prayer on a regular basis. *See generally* Br. of Am. Cur. American Football Coaches Association. Indeed, when respondents first appealed the district court's ruling in favor of Borden to the Third Circuit, *twenty* different *amici* rushed to support respondents' efforts to overturn the district court's Establishment Clause decision. Pet. App. 3a–4a. Respondents' claim that the case has suddenly become unimportant rings hollow.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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108

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In The
Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; AND DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN FOOTBALL COACHES ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 25

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES:

Lee v. Weisman, 505 U.S. 577 (1992) 5, 13, 23

Lemon v. Kurtzman, 403 U.S. 602 (1971).....6

Lynch v. Donnelly, 465 U.S. 668 (1984) 6

Santa Fe v. Doe, 530 U.S. 290 (2000).....*passim*

Tinker v. Des Moines, 393 U.S. 503 (1969) 23

U.S. COURT OF APPEALS CASES:

Borden v. East Brunswick, 523 F.3d 153 (3rd Cir. 2008).....4, 5, 14, 21

Doe v. Duncanville, 70 F.3d 402 (5th Cir. 1995).....5, 19, 20, 21

INTEREST OF *AMICUS CURIAE*[1]

The American Football Coaches Association ("AFCA"), founded in 1922, is the primary professional association for football coaches at all levels of competition – professional football, college football, high school football, and youth football. The AFCA has grown to over 10,000 members, including coaches from Canada, Europe, Australia, and Asia. Past presidents of the AFCA include the legendary John Heisman (from whom the Heisman Trophy takes its name), and respected coaches like Paul "Bear" Bryant, Darrell Royal, and Bo Schembechler. The international headquarters for the AFCA, in Waco, Texas, includes a memorial plaza that honors men of influence – football coaches. This "Plaza of Influence" was inspired by the countless coaches who have encouraged, motivated, and influenced the millions of boys and young men who have played the game of football. Inscriptions on plaques, benches, bricks, and tiles are testimony to the many ways that young lives can be touched and forever changed by a football coach.

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[1] This brief has been exclusively authored by counsel for *amicus curiae* as indicated on the cover of the brief, none of whom are attorneys for any of the parties to this litigation. There was no monetary contribution to the preparation or submission of this brief made by any person or entity other than the *amicus curiae*.

This *amicus curiae* brief is being filed in compliance with Rule 37.2(a)'s notice requirement, and with the written consent of all parties.

The improvement of the coaching profession has always been one of the AFCA's top priorities. The AFCA's interest in the present case is evident in the AFCA Constitution, which indicates that the AFCA was formed, in part, to "maintain the highest possible standards in football and the profession of coaching," and to "provide a forum for the discussion and study of all matters pertaining to football and coaching." A federal court decision ruling that it is unconstitutional for a coach to show respect to his players by bowing his head when those players choose to pray in advance of a football game "pertains to football and coaching." Regardless of one's faith, any rule that precludes coaches from engaging in basic human decency undermines "the highest possible standards in . . . the profession of coaching." But even more than the AFCA Constitution, it is that Plaza of Influence that demands AFCA participation in this lawsuit. The most important role coaches play is to be a positive influence in young lives. When the federal courts interpret the Constitution in a way that intrudes into the locker room, invades the player-coach relationship, and undermines a coach's ability to maintain an atmosphere of mutual respect and team unity by showing deference to the prayers of this nation's youth, that concerns the AFCA. The AFCA Board of Directors unanimously voted to authorize the filing of this *amicus curiae* brief at its annual summer meeting in Phoenix, Arizona, on May 5, 2008.

REASONS FOR GRANTING THE WRIT

This Court Should Grant the Petition for Certiorari and Clarify What the Establishment Clause Permits Public School Coaches to Do When Their Players Initiate Team Prayer.

For the thousands who coach it, and the millions who play it, football is more than just a game of touchdowns and field goals, wins and losses, and championship seasons. Football teaches commitment to a team goal, perseverance in the face of adversity, and the importance of planning and preparation to ultimate success. It rewards competitiveness on the field, yet promotes camaraderie off the field. Football encourages players to develop physical fitness, mental toughness, and strength of spirit. With its focus on good practice habits and consistency, football vividly shows student-athletes that hard work and dedication lead to improvement and increased chances of success, not only on the athletic field but in any of life's endeavors, whether of a professional or personal nature. Thus, football is not just a microcosm of life, football is *preparation for life*. Indeed, for the boys and young men who play it, it *is* life – an important rite of passage from adolescence to adulthood.

Given the important role that football plays in the lives of those who play it, and the seriousness of purpose required by the sport, it is hardly surprising that player prayer has become indelibly a part of football. When life gets serious, people pray. When

life transitions from one stage to the next – graduation, marriage, parenthood, retirement, death – people pray. There is a reason why persons are not typically moved to pray before playing monopoly, or bridge, or a round of golf with friends, but frequently *are* moved to pray immediately prior to or after playing a high school or college football game. It's not just the violent nature of the sport and the ever-present possibility of serious and perhaps life-altering injury; it's also the sense that these games are important signposts marking the road to becoming an adult. But whatever the reasons, football players pray.[2]

The Third Circuit's decision in *Borden v. East Brunswick*, 523 F.3d 153 (3rd Cir. 2008), especially when read in light of questions arising as a result of this Court's ruling in *Santa Fe v. Doe*, 530 U.S. 290 (2000), has put this nation's public high school and university coaches in a quandary when their players do what football players will routinely do as part of pre-game or post-game rituals – pray, pray together, and pray out loud. The Third Circuit in *Borden* interpreted *Santa Fe* to constitutionally prohibit a public school coach from engaging in a simple

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[2] According to a recent AFCA survey in which 300 college and high school football coaches participated, 95% of football teams reported that players engage in some form of vocal, collective, game-day prayer in a team setting; and 85% reported participation by the *entire team*. *See* "AFCA Team Prayer Survey & Results," Appendix A, Questions 1 and 6.

display of respect – taking a knee or bowing his head – during player-initiated prayers. *See* 523 F.3d at 176-178. If that is the law, the only legal "safe harbor" for a coach is to abruptly leave the presence of players as they begin to pray, effectively abandoning his team during what his players obviously perceive to be important game-related endeavors. The coach cannot prohibit players from praying (not that any coach would want to) without violating the constitutional rights of the players. *See Santa Fe*, 530 U.S. at 302. Neither can a coach "participate" in player prayers without violating the Constitution. *See Doe v. Duncanville*, 70 F.3d 402, 406 (5th Cir. 1995). Now, according to *Borden*, a coach who merely shows respect for his players' decision to pray, by taking a knee or bowing his head, can be held in violation of the Constitution. *See* 523 F.3d at 176-178. Indeed, even a coach who stands by stoically while his players pray could be accused of monitoring whether players are participating, thereby improperly "coercing" reluctant team members to join those team leaders who initiate the prayer. *See Lee v. Weisman*, 505 U.S. 577, 590, 592-593 (1992) (school officials, by monitoring student prayer, can cause the "subtle" or "indirect" coercive pressure that is constitutionally forbidden). The most constitutionally sound practice, apparently, is to walk out on one's players.[3]

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[3] Walking out, of course, could be construed as reasonably communicating a message of disapproval or hostility toward religion, which this Court says is *also* inconsistent with the

(Continued on following page)

The current unsettled and somewhat confusing state of Establishment Clause law puts coaches between a rock and a hard place. Choosing what may be the legally safest path – leaving the presence of praying players and thereby giving the appearance of abandoning them in serious, reflective pre-game or post-game moments – projects fearfulness and hyper-sensitivity rather than leadership, and threatens to undermine the relationship between players and coaches. On the other hand, to practice basic human decency by respecting the religious display of others – by bowing one's head or taking a knee (or simply remaining on a knee when the coach's pep talk ends and a player-initiated prayer begins) – risks a violation of the fundamental law of the land. The AFCA respectfully urges this Court to grant the Petition and clarify that effective leadership of this nation's youth, and the demonstration of basic respect for the

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Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The record in this case (specifically, the joint appendix filed in the Third Circuit) reveals that Coach Borden's players felt awkward and uncomfortable during the 2005 season when their coaches would freeze during player-initiated prayers. J.A. 169; 440-442. The players believed it hurt team morale. J.A. 169. Because this Court has condemned governmental conduct having the primary effect of advancing *or* inhibiting religion, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), surely the sensitivity of students to what reasonably appears to be governmental *hostility* to religion is as constitutionally significant as the sensitivity of students to what reasonably appears to be governmental *endorsement* of religion.

prayers of this nation's youth, is not at odds with the Constitution.

The football coaches of America have no desire to flaunt federal law. Quite to the contrary, coaches uniformly stand for the proposition that individual desires must give way to rules that promote the good of the team. Disciplined adherence to rules – including the rule of law – is what good coaches demand of the young men under their tutelage. But coaches sorely need this Court's guidance and, by their *Amicus Curiae* Brief in Support of the Petitioner, seek to convey both the significance of the problem and the urgency of the need for this Court's intervention. It is difficult for football coaches, even with the advice of counsel, to see the sideline clearly (if at all) in an area of constitutional law where the textual "Congress shall make no law respecting an establishment of religion" has become, at least in large chunks of the nation, "Football coaches shall make no physical movement that shows respect for their players' prayers."

The expansion of Establishment Clause law to a point where it is now several football fields away from the text ("Congress" = "football coach"? "Make no law" = "make no physical movements"? "Establishment" = "showing deference and respect"? "Religion" = "player-initiated prayer"?) may reflect the possibility that mistakes have been made along the way. But even treating prior judicial fumbles as precedential water under the *stare decisis* bridge, the resulting elasticity of constitutional text has produced a troublesome

lack of clarity as to where the "out-of-bounds" lines are located. Consequently, coaches experience a frustrating inability to remain in confident compliance with the law, even in regard to those routine interactions between players and coaches that lie at the heart of this case.

The football coaches of America would benefit from a decision by the Court to review this case and announce that it is not unconstitutional for coaches to remain present and take a knee or bow their heads when their players initiate game-related prayer. By reducing the likelihood of federal judicial intrusions into the locker room, this Court would be providing coaches the autonomy so necessary in building mutually respectful relationships with their players. By reducing the pressure on school districts (who are understandably concerned about litigation) to overregulate their coaches' locker room activities, the Court would be promoting amicable relationships between coaches and their institutional supervisors. Additionally, by clarifying what is permissible for coaches, so that coaches' behavior does not inadvertently convert what would otherwise be student-initiated and protected prayer into the school-sponsored prayer prohibited by *Santa Fe*, the Court would be preserving breathing space for the rights of student-athletes to pray. Finally, by providing guidance to the nation's judges, the Court can foster a legal environment whereby the respect permissibly shown by coaches toward player-initiated prayer does not vary from coach to coach, from institution to

institution, or from region to region. A decision by this Court for Coach Borden will ensure that in *all* educational institutions, coast to coast, public or private, in whatever sport, this nations' *coaches* – and not its *courts* – will decide how best to display respect, to build mutual trust, to inspire selfless commitment to shared goals, and to foster growth in maturity as an athlete, as a teammate, and ultimately as a citizen.

A. The Issue in this Case Impacts Hundreds of Thousands of Public School Coaches and Affects the Unique Relationships Those Coaches Forge with Millions of this Nation's Youth at Critical Points on the Road to Maturity.

There are over 100,000 football coaches in this country,[4] a majority of whom are coaching at public educational institutions bound by the First Amendment. Of course, coaches of every other team sport are similarly impacted by the issue at the heart of Coach Borden's Petition for Writ of Certiorari. Those hundreds of thousands of coaches are responsible for

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[4] *See* Appendix B. The numbers in Appendix B do not include the thousands coaching football at grade schools, junior highs, and community colleges. Nor do they include those coaching baseball, basketball, softball, soccer, hockey, wrestling, gymnastics, tennis, golf, track and field, cross country, volleyball, etc. The total number of public school coaches, from grade school through college, surely is in the millions.

the leadership and training of millions of grade school, high school, and college athletes. With the influence of Title IX and the increasing participation in team sports of girls (and young women) at all levels of education, completing one's education *without* participation in team sports is fast becoming the exception rather than the rule.

Football and team prayer go together as naturally as touchdowns and extra points. At all levels of football, prayer before pre-game meals and prayer in the locker room prior to running out on the field is as routine as the pre-game warm-up. Though football is certainly not the only team sport in which athletes are motivated to engage in vocal team prayer on game days, football may be unique in its ability to inspire its players to pray. Football is a contact sport, arguably resulting in the most routinely violent contacts of any team sport played at the high school and college level. Football is perhaps also unique in the degree of interdependence required for the 11 players on the field to function effectively as a team. But whether players are motivated to pray primarily because of the rigors and dangers of football, or whether they are motivated primarily by a concern that they not "let their teammates down," players will pray on game day. Whether they are praying for protection or confidence or team unity or ultimate success, players will be praying on game day. And, because team unity is promoted by praying together, players will pray not just silently by themselves but collectively and vocally, often holding hands.

Due to the nature of football and the timing of when players normally decide to engage in collective vocal prayer, coaches will always be nearby, and will typically be in the immediate presence of their praying players.[5] Thus, the issue that prompted Coach Borden to pursue a declaratory judgment is one that will inevitably and repeatedly confront virtually every public school football coach in the land: "How do I, without violating the Constitution, show respect for my praying players and demonstrate that I stand in unity with them and in support of them as they solemnly prepare for the difficult and potentially dangerous task that lies ahead?"

A football coach is not just a taskmaster. A coach is a leader. The goal of coaching is to affirm, to encourage, to mentor, to teach. Indeed, for the increasing number of boys and young men who grow up in a home lacking the consistent presence of a positive male role model, a football coach not infrequently becomes the most important father figure in a young life. But even if one artificially restricts the role and impact of a coach solely to matters of football, mutual respect and team unity are critical in playing the game of football successfully. Bowing one's head or taking a knee during player-initiated prayer signifies

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[5] *See* "Survey," at Appendix A, Question 2 (95% of respondents – 282 of 297 – reported that coaches are typically present and in view of praying players at those times when players engage in vocal collective prayer in team settings on game day).

a coach's respect for his players and his unity with them as they prepare for the impending battle on the football field. Because promoting mutual respect and team unity among players and coaches is critical to team sports, especially so in football, the decision of a coach to bow his head or take a knee in the pre-game context is much more about coaching than it is about religion.[6] It's much more about *leader*ship than it is about *wor*ship. And it's much more about *football* leadership than it is about *spiritual* leadership. A coach should be permitted to act like a coach, especially immediately prior to what players, coaches, and fans view as the ultimate test of the sport – the games themselves. Denying coaches the permission to take a knee or bow their head when their players pray on game day is denying coaches the ability to promote team unity and mutual respect at a critical time;[7] it is denying coaches their stature as a leader of youth;[8] indeed, it is nothing less than denying coaches their ability to coach.

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[6] Indeed, even coaches who are non-believers will routinely bow their heads in respect. *See* "Survey," at Appendix A, Question 11 (94% of coaches agreed with proposition).

[7] *See* "Survey," at Appendix A, Question 8 (85% of coaches considered the inability to take a knee or bow their head while in the presence of praying players to be "a threat to player morale, team unity, and/or a mutually respectful relationship between players and coaches").

[8] *See* "Survey," at Appendix A, Question 9 (85% of coaches believed that the inability to take a knee or bow their head while in the presence of praying players undermined their "role as a leader of young men").

When the Constitution actually clashes with effective coaching, it is of course the Constitution that must remain supreme. When school officials truly are coercing student prayer, the sensitivities of the dissenting individuals, even if small in number, trump the majority's desire to pray. *See Lee v. Weisman*, 505 U.S. at 592-593. And when strong evidence of school sponsorship contradicts claims that prayer is student-initiated, this Court has ruled that the few offended have a right to shut down the desires of the vast majority. *See Santa Fe*, 530 U.S. at 302-310. Perhaps this is as it should be in a nation that attaches such a strong value to *individual* religious freedom. But when prayer is truly student-initiated and thus an expression of the free exercise rights of *private individuals*, any serious concerns about the sensitivity of the few present who may take offense, or who may feel pressure to participate despite their reluctance to do so, are no longer properly the concerns of the First Amendment and the courts. Thus, when a coach shows respect to a player-initiated prayer, no matter whether it involves the entire team, or most of the team, or a small part of the team, this surely is a time when a coach's desire to foster unity and mutual respect should survive the individual preferences and sensitivities of those few who may feel uncomfortable during the prayer.

A coach's autonomy in interacting with his team is vital to effective coaching. The AFCA simply seeks a signal from this Court that the Establishment Clause concerns, if any, triggered by bowing one's

head or taking a knee during player-initiated prayers, are too insignificant to interpret the Constitution to prohibit such innocuous displays of decency and respect. The one-size-fits-all policy that will be the natural result of cases like *Borden* – whereby coaches must stand by motionless and expressionless or leave the praying players' presence – is a policy that effectively orders coaches to take a "time out" from coaching at a time when they are in the face-to-face presence of their players at an event central to the player-coach relationship. That is humiliating to players and coaches alike.

It could be argued that what the Third Circuit's ruling lacks in sensibility it gains back in simplicity – after all, what could be more simple than a rule that requires coaches either to act like a robot or to retreat whenever player-initiated prayer happens? But one wonders, what's next? Without meaningful limits on the scope of Establishment Clause prohibitions, there will be no limit to just how sensitive (and how litigious) the religion-intolerant may become. Will coaches be sued (or threatened with sanctions by lawsuit-phobic school districts reacting to parental complaints) for telling players that they have "God-given talents" and coaching them to get the most out of such talents? For telling players that to whom much is given much is expected? If a player dies during the season in an automobile accident, will coaches be sued for organizing the team's attendance at their stricken teammate's funeral and burial? For bowing their heads with the rest of the team during a prayer

at the grave site? If a player without a father figure approaches the coach after practice, while other teammates are still present, and asks the coach to pray with him because his mother has just been diagnosed with cancer, must the coach decline because he is still operating on the school's nickel? Indeed, even Knute Rockne's legendary "Win One for the Gipper" speech might invite a lawsuit if delivered at a public high school or university in today's legal environment. In extolling his team to beat a superior opponent in memory of George Gipp (one of college football's all-time great players, who had died tragically at the end of his senior season several years earlier), Coach Rockne told his players that the Gipper would be watching. Because the context reasonably implied that the Gipper was in heaven, was Coach Rockne endorsing religion?

In sum, given the millions of public school participants in team sports, given the importance of the player-coach relationship to the maturation of the nation's youth, given the frequency with which those young persons will choose to pray prior to competition because of the solemnity and seriousness with which players approach the game, given the constitutionality of the players' decision to pray, given the mutual respect and team unity fostered by a coach bowing his head or taking a knee in response to player-initiated prayer, and given the uncertainty fostered by the current legal environment, this case is more than worthy of this Court's attention. By deciding this case, the Court can return the locker room to

America's coaches and players, entrust coaches with player-coach relationships, put an end to the humiliating inability of coaches to role model basic human decency and respect, and free coaches up to do what they have long done well – lead this nation's youth into adulthood.

B. The Current Legal Landscape Defies Honest Efforts By Coaches, Schools, and Courts to Navigate It Successfully.

The nation's coaches, schools, and courts need this Court to answer the following question: When students engage in what is truly student-initiated and therefore constitutionally protected prayer, what does the Establishment Clause permit public school coaches and teachers to do? *Santa Fe* does not answer this question because the Court in *Santa Fe* ultimately ruled that the student-delivered prayers in that case were not truly student-initiated, but rather were affirmatively school-sponsored due to the degree of official involvement. *See* 530 U.S. at 302-310. But what of prayers that truly *are* student-initiated and *not* school-sponsored? Coach Borden simply asked whether the Constitution permitted a coach to take a knee or bow his head, and he got three different answers from the Third Circuit panel: yes, no, and maybe.

The Third Circuit's splintered ruling raises more questions than it answers. If a coach is on constitutional thin ice merely by taking a knee or bowing his

head, is he similarly in danger of violating the Establishment Clause by taking off his hat? Or by temporarily halting a conversation with another coach so that the praying students may enjoy an environment of silence? Aren't all these displays of decency and respect of questionable constitutional propriety given the prevailing legal environment? Must coaches really act apathetically and disrespectfully toward the prayer in order to increase their chances of compliance with the law? Or, because governmental *hostility* toward religion is *also* constitutionally suspect, would such a strategy accomplish no more than to exchange endorsement suits for hostility suits?

Coaches' concern for their legal well-being is certainly not out of harmony with their players' own legal well-being. If "school-sponsored" prayer is prohibited under *Santa Fe*, and if the degree of governmental involvement can convert protected "student-initiated" prayer into prohibited "school-sponsored" prayer, then a coach's response to player-initiated prayer could conceivably, albeit inadvertently, undermine the players' right to pray. One of the problems posed by the *Santa Fe* analysis is that, in condemning the *Santa Fe* prayer as "school-sponsored" rather than truly "student-initiated," this Court highlighted a number of factors (*see* 530 U.S. at 307-308) that are *always* going to be present when public school athletes initiate vocal game-related prayers. The message, because it is a prayer, will necessarily have religious content; and

the athletes will never decide to turn the locker room into an open forum where all manner of social and political issues can be discussed. The prayers will always be delivered on government property in a location subject to the control of school officials. These prayers will always take place at government-sponsored, school-related events. The audience present will always be assembled as part of a regularly scheduled school function. Those players who choose to pray will always be subject to the ultimate supervision of the coaches. And the coaches will almost always be present when their players decide to initiate vocal team prayer. Add to all this "school involvement" the practical need for players to be informed by coaches at the beginning of the season about their right to pray if they so choose, and it becomes difficult under *Santa Fe* to determine how "student-initiated" (and protected) can avoid becoming "school-sponsored" (and prohibited) at the whim of any court. Under *Santa Fe*, simply informing students about their rights (in an educational environment!) can be constitutionally suspicious. How does a coach inform players of their right to pray without being accused of having a "policy" of endorsing prayer? At some point, there is a danger that all the talk about students' rights will become just that – talk.

There is also the question of whether coaches may wear any hat other than one of official capacity when they are in charge of students. Is a coach when coaching to be viewed as 100% state actor? Is there no part of the player-coach relationship where a coach

retains a small portion of his "private capacity"? Is he just a government mouthpiece and no more simply because he accepted employment with a public institution in order to dedicate his life to coaching and teaching our youth? Is a coach's one-on-one locker room prayer with a student who has just lost a loved one really to be regarded as a government prayer? If those representing the school are to be regarded as 100% state actor, couldn't that same theory be applied to the students who wear the school's colors and carry the school's name on their jerseys? If courts are unwilling to sacrifice student-athletes' rights to such a rigidly robotic theory of state action – *i.e.*, one that would deny private personhood to any who represent their public institutions – why is such an unrealistic view applied to coaches? Must even the small gestures of decency and respect displayed by Coach Borden be considered wholly state action as opposed to, at least in some small part, a private interaction between human beings who just happen to be representing their school in athletic competition? In short, why is Coach Borden all coach and no Borden?

The unsettled and confusing status of the law predictably has led to lower court arbitrariness. The Fifth Circuit in *Duncanville,* in its analysis of student-initiated prayer, drew a distinction between graduation ceremonies and athletic contests. *See* 70 F.3d at 406-407. According to the Fifth Circuit, athletic contests are less solemn and less significant than graduation ceremonies, thereby making any

degree of governmental involvement more constitutionally suspect. *See id.* It is not clear why courts should be approving or disapproving prayer based on the courts' own view of the solemnity or importance of occasions where citizens feel moved to pray. In any event, though graduation marks an important occasion, most graduations do not pose the possibility of serious injury to the participants, and graduation ceremonies rarely depend for their success on students performing difficult interdependent tasks with skill and precision in the face of intense physical resistance.

The arbitrariness of the Fifth Circuit's distinction between graduation ceremonies and athletic contests is matched by the vagueness of its line between permissible and impermissible coach behavior. According to *Duncanville*, coaches are not just permitted but are required to treat players' religious practices with "deference" and "respect"; but coaches may not "manifest approval and solidarity with" the players' religious practices. *See* 70 F.3d at 406 n.4. Continuing, the Fifth Circuit explained that, although coaches are properly enjoined from "participating" in student-initiated prayers, *see id.* at 406, coaches need not leave the praying students' presence or otherwise make their non-participation vehemently obvious. *See id.* at 406 n.4. The utter arbitrariness of *Duncanville*'s "standard" becomes apparent when trying to apply it to Coach Borden's practice of taking a knee or bowing his head during player-initiated prayer. His behavior easily fits the Fifth Circuit's description of

obligatory "deference" and "respect." It also easily fits the Fifth Circuit's description of prohibited "approval" and "solidarity." One judge might see Coach Borden's behavior as prohibited "participation," while the next might say that anything less participatory would be making his non-participation vehemently obvious, which the Fifth Circuit says is not required.

The Third Circuit's ruling creates an apparent conflict with the Fifth Circuit: The Fifth Circuit in *Duncanville* says that a coach need not make his non-participation vehemently obvious, *see* 70 F.3d at 406 n.4, but the Third Circuit's ruling in *Borden* effectively requires coaches to do so. Some coaches, that is. A requirement of vehemently obvious non-participation would be an extreme reading of the Establishment Clause, but at least it would seem to provide some clarity. The Third Circuit analysis, however, does not even do that. Instead, the determinative factor below was Coach Borden's "prayer history" as a coach. *See* 523 F.3d at 178-179. Thus, a coach with a certain kind of prayer history might have to make his non-participation vehemently obvious – and thereby undermine the atmosphere of mutual respect and team unity coaches try so hard to create – while a coach with a different kind of prayer history, or one without a prayer history, might remain free to do the decent and respectful thing by taking a knee or bowing his head. This is not only arbitrary and unpredictable (do coaches have to do a self-analysis of their prayer history?), it is patently inequitable in a way that could undermine competitive

balance. Because football performance is so dependent on the player-coach relationship, and because that relationship is enhanced by mutual respect and team unity, it plainly generates concerns about competitive balance when some coaches are more restricted than others in matters central to leadership.[9] The AFCA stands strongly for consistency. The rules should be the same for all coaches. Of course, because private and public schools often compete against each other, the only way to avoid dramatic differences in treatment is to read the Establishment Clause sensibly to permit public school coaches to display basic human decency and respect toward the game-related prayer practices of their players. The AFCA respectfully urges the Court to take the present opportunity to do so.

In conclusion, the current legal environment places the nation's public schools, players, and coaches in an untenable situation, but there is a way out. That "way out" would require this Court to grant the Petition in a case like the present one, but would not require the Court to substantially rework its Establishment Clause jurisprudence. Indeed, it would not require *any* of this Court's cases to be overruled.

---

[9] *See* "Survey," at Appendix A, Question 10 (69% of coaches considered it a threat to competitive balance to permit some coaches to take a knee or bow their head during player-initiated prayers while denying that privilege to other coaches).

Simply by sensibly applying a rule discernable in both *Santa Fe* and *Lee*, this Court can clear up a lot of confusion and provide needed guidance, while at the same time staying true to the foundational Establishment Clause doctrines that the Court has repeatedly emphasized. According to *Lee* and *Santa Fe*, the Constitution prohibits prayers that "bear the imprint of the state" because of "the degree of school involvement." *See Santa Fe*, 530 U.S. at 305, *citing Lee*, 505 U.S. at 590. By deciding the instant case and distinguishing it from *Santa Fe,* the Court can provide a clear example of when the degree of school involvement is so minor – for example, a coach merely bowing his head or taking a knee in response to what is truly student-initiated prayer – that the prayer in no way "bears the imprint of the state."

A holding in favor of Coach Borden is not only easily reconcilable with *Santa Fe* and *Lee*, it could also reinforce foundational First Amendment theory. Viewing Coach Borden's respectful but innocuous gestures as themselves "private" rather than "public" would be consistent with this Court's pronouncement that teachers, like students, do not give up the entirety of their private personhood and lose all their rights as private citizens just by walking through the schoolhouse gate. *See Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). But even if Coach Borden is viewed as "all coach, no Borden" (as 100% state actor), holding his respectful gestures to be constitutionally appropriate is consistent with the notion, often espoused in this Court's precedent, that there is

a range of permissible governmental "accommodation" of religion that is neither the *promotion* of religion nor the *hostility* toward religion that the Establishment Clause prohibits. In other words, reversing the Third Circuit's holding would undo the message that a degree of hostility may be necessary to safely avoid endorsement.

A decision for Coach Borden in this case would also reinforce the relevance of Establishment Clause text by refusing to read "make no law respecting an establishment of religion" to say "make no gesture displaying respectfulness to the prayers of others." Finally, such a ruling would be consistent with the Framers' desire to restrict "top down" enforcement of belief in order to protect "grass roots" religious practices of the type involved here. Whatever labels may be placed on Coach Borden's gestures – whether "public capacity," "private capacity," or "semi-private capacity"; whether "participation" or "non-participation"; whether expressing "respect and deference" or "approval and solidarity"; whether "endorsement" or "accommodation" – this case plainly does not involve the "top down" enforcement of belief that the Framers were targeting with the Establishment Clause. This case is not even in that ballpark.

CONCLUSION

For all these reasons, the American Football Coaches Association respectfully urges the Court to grant the writ of certiorari in order to decide the important issue posed by this case.

Respectfully submitted,

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APPENDIX A

AFCA TEAM PRAYER SURVEY & RESULTS (Survey of College and High School Coaches; Conducted in August, 2008)

Survey and results can be found at http://www.afca.com/ViewArticle.dbml?DB_OEM_ID=9300&ATCLID=1600166

*For purposes of this survey, "vocal collective prayer" means prayers joined in by multiple players on the team, where at least one person in the prayer group is praying out loud for all in the group to hear. (It does not require that the whole team be participating in the prayer group.)

1) Do players on your team engage in vocal collective prayer in *any* team setting (pre-game meal or locker room or field) on game days?

285 Yes 15 No (95% Yes)

2) Are coaches typically present and in view of the praying players at those times when players engage in vocal collective prayer in team settings on game days?

282 Yes 15 No (95% Yes)

3) Are vocal collective game-day prayers in a team setting typically initiated by the players themselves rather than the coaches?

174 Yes 144 No (55% Yes)

4) Do you as coach view vocal collective game-day prayers as making a positive contribution to a player's mental preparation for the game?

283 Yes 15 No (95% Yes)

5) Do you as coach view vocal collective game-day prayers as making a positive contribution to overall team unity?

283 Yes 13 No (96% Yes)

6) Is there any game day setting in which *the whole team* will gather together during a vocal prayer delivered (by either player or coach) so that the whole team can hear? (This is the only question on the survey where a yes answer requires the whole team gathered together during a prayer.)

257 Yes 43 No (85% Yes)

7) When your coaches are in the immediate presence of players who are engaging in vocal collective prayer, will they typically show deference and respect to the praying players such as by taking a knee or bowing their head?

279 Yes 12 No (96% Yes)

8) If coaches were not permitted to take a knee or bow their head during players' vocal collective prayers, but had to leave the players' presence or otherwise make their non-participation obvious, would you consider that a threat to player morale,

team unity and/or a mutually respectful relationship between players and coaches?

246 Yes 45 No (85% Yes)

9) If coaches were not permitted to take a knee or bow their head during players' vocal collective prayers, but had to leave the players' presence or otherwise make their non-participation obvious, would you consider that to undermine your role as a leader of young men?

254 Yes 44 No (85% Yes)

10) If you were not permitted to take a knee or bow your head during players' vocal collective prayers, but your opposing coach *was* permitted to do so, would you consider that a threat to competitive balance?

201 Yes 90 No (69% Yes)

11) To the extent that you have known of players or coaches on your team who were non-believers, has it been your experience that such players and coaches would nevertheless show deference and respect to those who were engaging in vocal collective game-day prayer, such as by bowing their heads or taking a knee?

274 Yes 18 No (94% Yes)

APPENDIX B

FOOTBALL COACH AND PLAYER DATA
(Compiled by AFCA, July, 2008)

Data can be found at http://www.afca.com/ViewArticle.dbml?DB_OEM_ID=9300&ATCLID=1600166

Key:
NCAA = National Collegiate Athletic Association
FBS = NCAA Football Bowl Subdivision (formerly "Division I-A")
FCS = NCAA Football Championship Subdivision (formerly "Division I-AA")
DII = NCAA Division II
DIII = NCAA Division III
NAIA = National Association of Intercollegiate Athletics
HS = High School

See table at page B-2 of this Appendix.

	FBS	FCS	DII	DIII	NAIA	HS**	Total
Football Teams	120	123	145	238	90	15,086	15,802
Ave. Coaches Per Team	11*	10*	8*	8*	8*	7	
Total Coaches	1,320	1,230	1,160	1,904	720	105,602	111,936
Head Coaches	120	123	145	238	90	15,086	15,802
Players***	12,000	12,300	14,500	23,800	9,000	1,131,484	1,203,064

*The averages used for the college divisions are based on data compiled as part of an AFCA survey conducted in June, 2008. The averages used are rounded down and therefore actually understate the total number of college coaches.

**High School team and player data provided by National Federation of State High School Associations; total high school coaches is based on a conservative assumption of 7 coaches per team.

***College player data assumes an average of 100 players per team.

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No. 08-482

In The Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK, NEW JERSEY, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, DAVID HOROWITZ FREEDOM CENTER, INDIVIDUAL RIGHTS FOUNDATION, THE JUSTICE FOUNDATION, AND ALLIANCE DEFENSE FUND IN SUPPORT OF PETITIONER

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November 14, 2008

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

ISSUE PRESENTED 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Third Circuit failed to recognize the sharp contrast between the pro-prayer policy found unconstitutional by the Court in *Santa Fe* and East Brunswick School District's facially neutral prayer policy, resulting in a holding contrary to this Court's precedent 5

A. The EBSD prayer policy was distinguishable from the *Santa Fe* pro-prayer policy because EBSD promulgates a facially neutral prayer policy that only addressed employee behavior 6

B. The Third Circuit failed to recognize the protected private nature of the students' speech and incorrectly held that Coach Borden's demonstration of respect for the students' speech transformed that speech into impermissible government endorsement of religion 9

TABLE OF CONTENTS – Continued

Page

II. The Third Circuit failed to provide First Amendment viewpoint protection to student-initiated, student-led prayer, thereby allowing EBSD's policy to have the effect of chilling constitutionally protected student speech 13

III. The Court should clarify and unify the test in school environment religious expression cases by articulating and adopting a Coercion test which allows passive and symbolic conduct by government actors, protects individual viewpoints, and does not chill constitutionally protected student-initiated and student-led prayer in a school environment 18

A. The Court currently applies at least three tests for adjudicating Establishment Clause cases like the instant case, which leads to disparate findings of constitutional protection for similar speech 20

B. The Court should articulate and adopt a single test that does not implicate passive or symbolic government conduct when determining an Establishment Clause violation, yet affords constitutional protection for private speech in a public school environment 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Felton, 473 U.S. 402 (1985) 20

Board of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) 15

Borden v. Sch. Dist. of the Township of East Brunswick, New Jersey, et al., 523 F.3d 153 (3d Cir. 2008) ..... *passim*

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 10, 16, 21

Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) 12

Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000) 11, 12, 13

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) 15

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 18, 20, 22, 24

Edwards v. Aguillard, 482 U.S. 578 (1987) 18

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 20

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 3, 14

Hunt v. McNair, 413 U.S. 734 (1973) 20

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 14, 20, 21

Lee v. Weisman, 505 U.S. 577 (1992) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Lemon v. Kurtzman, 403 U.S. 602 (1991) 20

Lynch v. Donnelly, 465 U.S. 668 (1984) .....*passim*

Marsh v. Chambers, 463 U.S. 783 (1983) 20

Morse v. Frederick, 127 S. Ct. 2618 (2007) 13

Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244 (3d Cir. 1993) 17

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 14, 18

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) .....*passim*

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 13

Wallace v. Jaffree, 472 U.S. 38 (1985) 7, 8, 20

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TABLE OF AUTHORITIES – Continued

Page

Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, 163 (MacMillan 1986) 19

Michael W. McConnell, *Exchange; Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992) 19, 22

INTEREST OF *AMICI CURIAE*

The entities participating in this brief share an abiding interest in the fair and equitable application of the Establishment Clause within First Amendment jurisprudence. From a public interest perspective, the entities assert that a fair application of the Establishment Clause does not include purging *de minimis* signs of respect for constitutionally protected religious practices. The historical meaning of the First Amendment does not contemplate prohibiting a public official or employee from respectfully recognizing students' private religious expression because such a prohibition chills and demeans that constitutionally protected expression.

Southeastern Legal Foundation, Inc. ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States.[1]

The Individual Rights Foundation ("IRF") was founded in 1993. It is the legal arm of the David

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[1] Counsel of Record for the parties received timely notice of *Amici Curiae's* intent to file this brief and have provided written consent to its filing. No counsel for a party authored the brief in whole or in part nor made any monetary contribution intended to fund the preparation or submission of the brief.

Horowitz Freedom Center ("DHFC"), a non-profit 501(c)(3) organization. The mission of DHFC is to promote the core principles of free societies – and to defend America's free society – through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, the IRF litigates cases and, together with the DHFC, participates as *amicus curiae* in appellate cases, such as the case at bar, that raise significant First Amendment speech and Establishment Clause issues.

The Justice Foundation (formally the Texas Justice Foundation) was founded in 1993 to protect the fundamental freedoms and rights essential to the preservation of American society. The Justice Foundation represents clients free of charge in cases in the areas of limited government, free markets, private property, parental school choice, parental rights in education, and enforcing laws to protect women's health. The Justice Foundation is a non-profit, public interest litigation firm supported by tax-deductible contributions.

Alliance Defense Fund ("ADF") is a non-profit, public interest organization devoted to the defense of religious freedom. ADF pursues its goal of protecting religious liberty by providing strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent thousands of Americans who desire to maintain their right to religious expression. ADF has been directly or indirectly involved in at least

500 cases and legal matters, including numerous religious expression cases before the United States Supreme Court, including *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

ISSUE PRESENTED

By holding that high school Coach Borden's secular gestures of respect offered at the time his players initiated and led prayer in a non-public forum violated the Establishment Clause, the Third Circuit acted contrary to the rights of students, Coach Borden's duty to act in a neutral, non-hostile manner toward the students once they chose to pray and this Court's precedent. The three opinions by the Third Circuit exemplify the confusion that plagues the lower courts and attorneys who must advise not only school boards and administrators, but also parents with children in our public school systems. The result of this ongoing uncertainty is unpredictable litigation. This Court's jurisprudence and tests should provide understandable precedent, resulting in clear administrative policies and processes within the public school setting. Has the Third Circuit plurality's confused misapplication of this Court's Establishment Clause jurisprudence in a public school setting, as well as the conflict between the Circuits identified by petitioner, provided the sound basis for this Court to grant a *writ of certiorari* to the petitioner?

SUMMARY OF ARGUMENT

Coach Borden's demonstration of respect for player-initiated and player-led prayer does not rise to the level of an Establishment Clause violation. The Third Circuit misapplied the Court's holdings regarding acceptable behavior by school districts involving student-initiated, student-led private speech. The Court in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) detailed the amount of state entanglement necessary to transform student speech into coercive government speech bearing the school's imprimatur. None of these factors are present with the student prayers occurring in the East Brunswick School District. The players' prayers are not transformed from private speech into government speech because of the presence of Coach Borden or by his secular demonstration of respect.

Beyond the formalism of policies and attribution, courts must also look to the effect school directives have on students. If school districts promulgate policies that effectively chill students' constitutionally protected speech, they engage in viewpoint discrimination. The East Brunswick School District, historically and through the current policy, creates an environment hostile to religion. This atmosphere of intolerance toward religious viewpoints violates not only the Court's Establishment Clause mandate of religious neutrality, but also the broader First Amendment mandate of protection *against* viewpoint discrimination.

The Court's Establishment Clause jurisprudence is as confusing as it is voluminous. The different tests the Court employs force lower courts and attorneys into an inefficient "guessing game" as to the proper course of analysis. Further, all of the Court's current approaches lack the neutrality toward religion demanded by the Constitution. The Court should grant the petition for *writ of certiorari* in order to articulate a single Coercion test that discounts passive and symbolic government speech, while still barring government coercion of religion. This test will provide necessary guidance to the lower courts, protect all viewpoints and remain faithful to the Clause's true meaning.

ARGUMENT

I. The Third Circuit failed to recognize the sharp contrast between the pro-prayer policy found unconstitutional by the Court in *Santa Fe* and East Brunswick School District's facially neutral prayer policy, resulting in a holding contrary to this Court's precedent.

The lead opinion in *Borden v. Sch. Dist. of the Township of East Brunswick, New Jersey, et al.*, 523 F.3d 153, 175 (3d Cir. 2008), relied heavily on *Santa Fe*, which the Third Circuit rightly identified as the "leading case" concerning prayer at high school football games. But, the Third Circuit fundamentally misinterpreted and misapplied this Court's reasoning

for holding unconstitutional the prayers at issue in *Santa Fe*. This Court laid out a litany of missteps the Santa Fe School District ("SFSD") committed in adopting the religious speech at issue as its own, therefore violating the Establishment Clause. Some of the factors this Court identified only marginally applied to the East Brunswick School District ("EBSD" or "the District") and, indeed, others were polar opposite to the circumstances in *Santa Fe*. In rejecting the SFSD's claims, this Court noted: "The delivery of [the prayers] – over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer – is not properly characterized as 'private' speech." 530 U.S. at 310. The Third Circuit failed to acknowledge that the EBSD policy limited its application to employees and did nothing to further or encourage prayer by the students.

A. The EBSD prayer policy was distinguishable from the *Santa Fe* pro-prayer policy because EBSD promulgates a facially neutral prayer policy that only addressed employee behavior.

The Third Circuit erroneously applied *Santa Fe* by failing to recognize that, despite the fact that the EBSD policy addresses only employee speech in the prayer context, the policy nevertheless causes grave harm to students' 'private' speech (student-initiated,

student-led prayer) which would otherwise enjoy the protections of the First Amendment. Analysis of an alleged government Establishment Clause violation must include the government's official policy toward the religious action involved and the effects of that policy. The government's policy and what government officials say regarding that policy represents the easiest and most straightforward way to discern the government's posture toward religion. *This posture must be completely neutral – neither hostile nor overtly favoring – in order to withstand constitutional scrutiny. Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (emphasis added). This Court found the SFSD violated the Establishment Clause by promulgating a pro-prayer policy. 530 U.S. at 305. The Court considered at length how the SFSD "explicitly and implicitly encouraged prayer," thereby conveying both a "perceived and actual [government] endorsement" of prayer. *Id.* at 305, 310. The Court noted how the SFSD policy "invites and encourages religious messages." *Id.* at 306. The Court also expressed concern about how the policy's text produced only one clearly preferred message – a religious message. *Id.* at 315. The Court determined this governmental favoritism, expressed through the school's policy, was coercive in nature and violated the constitutional mandate of religious neutrality. *Id.* at 307-10.

The EBSD expresses no such governmental favoritism toward student prayers. The Third Circuit glossed over this key distinction in finding Coach Borden's actions constituted an Establishment Clause

violation. The EBSD's policy in no way "explicitly or implicitly" encourages student prayer. Unlike the policy in *Santa Fe*, the EBSD's policy is "hands off." *Santa Fe*, 530 U.S. at 305. The EBSD policy, while conceding the players have a right to pray, relinquishes all editorial control to the players. The policy consists of a list of actions in which school employees shall not engage when the students pray, and the consequences of any disobedience. *Borden*, 523 F.3d at 160-61. The Court concluded in *Santa Fe* that the purpose of the pro-prayer policy was to preserve a popular "state sponsored religious practice." 530 U.S. at 309 (quoting *Lee v. Weisman,* 505 U.S. 577, 596 (1992)). The EBSD policy targets the exact opposite goal: to dissolve completely any association the District has with a religious practice. The Third Circuit, while it acknowledged the pro-prayer policies in *Santa Fe*, failed to recognize the stark contrast with the EBSD policy. The SFSD's pro-prayer policy, and the atmosphere it created, formed the basis for the Court's holding in *Santa Fe*. The Third Circuit relied on this "leading case on high school prayer" without acknowledging the crucial difference between the respective policies' effects, thereby misapplying the bright line articulated in *Santa Fe*.

B. The Third Circuit failed to recognize the protected private nature of the students' speech and incorrectly held that Coach Borden's demonstration of respect for the students' speech transformed that speech into impermissible government endorsement of religion.

Because the Third Circuit failed to recognize the protected private nature of the player-initiated, player-led prayers, Coach Borden's actions were improperly relegated to the ash heap of "impermissible government endorsement." In *Santa Fe*, the Court was clearly concerned about the likelihood of school attribution. 530 U.S. at 308. In that case, a student broadcast the prayer over the school's public address system and addressed it to the general-public in a "ceremony . . . clothed in the traditional indicia of the school's sporting events." *Id.* The Court found this action to be a coercive religious message indicating school approval. No such imprimatur argument is possible with student prayers in the EBSD. One of the prayers occurs within the confines of the football locker room where the District only allows authorized personnel. *Borden*, 523 F.3d at 159. The second prayer before the pre-game meal occurs in the school cafeteria, where the prayers include the team, in some cases the cheerleaders and other invited guests. *Id.* The prayers are student-initiated, student-led and constitute private speech.

Student-initiated, student-led prayer is constitutionally protected private speech. As the Court noted,

private religious speech, hardly an "orphan," is fully protected under the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). The EBSD recognizes as much in its policy, which allows student-led prayer and cedes editorial control of that speech. This private student speech bears none of the school imprimatur factors troubling the Court in *Santa Fe*. To be sure, the students in the instant case pray at a school-sponsored event and wear the school's athletic uniforms, but the Court in *Santa Fe* carefully acknowledged not all speech occurring under these circumstances is government speech. 530 U.S. at 302.

The question is whether Coach Borden, who does not lead or participate in the prayers, but merely demonstrates respect for his players' private choice to pray, transforms the students' private speech by his actions into impermissible government religious speech? The Court in *Santa Fe* answered this question by detailing the amount of school involvement required to convert student private religious speech into speech impermissibly bearing the State's imprint. Aside from a pro-prayer policy, the Court detailed associative factors required for this transformation. A school district must "affirmatively sponsor" the speech, imbuing a high "'degree of involvement,'" and thereby putting "'school age children in an untenable position.'" *Id.* at 313; *id.* at 305 (quoting *Lee*, 505 U.S. at 590).

The EBSD, however, does not engage in any prayer "involvement" or "sponsorship," and thus the

prayers involve no coercion. Neither the District nor Coach Borden affirmatively sponsors the prayers, and the prayers, if they occur, are student-initiated and student-led. Coach Borden, in his email to the team captains, explained the choice to pray was completely in their hands and he would abide by whatever they wished. *Borden*, 523 F.3d at 162. Neither the District nor Coach Borden is involved with the prayers' selection, formation or content. Finally, according to school policy, it is completely at the players' discretion whether they pray, for what they pray, or even to whom they pray. At all times, the speech is controlled by students, in the private sphere, and free of State coercion, where the Court permits it. *Lee*, 505 U.S. at 589. The *Borden* lead opinion essentially recognized the non-coercive, non-transformative nature of Coach Borden's actions. Judge Fisher held that *but for* his prior prayer history, the mere demonstration of respect constituted just that – a demonstration of respect for his players' private speech. 523 F.3d at 178-79. Judge Barry's concurrence agreed with that assessment. *Id.* at 188. The district court went further by discarding the prior prayer history element. *Id.* at 164. Coach Borden's passive, symbolic demonstration of respect for his players' private choice to pray does not rise to the level state involvement found in *Santa Fe,* transforming private student speech into government speech.

The question of the degree to which government involvement rises to the level of coercion is examined by the Eleventh Circuit after *Santa Fe*. In *Chandler*

v. Siegelman, 230 F.3d 1313, 1315-16 (11th Cir. 2000),[2] the Eleventh Circuit, while not addressing the issue of government employee involvement,[3] grasped the Court's key *Santa Fe* distinctions. Unlike the Third Circuit, the Eleventh Circuit understood the difference between impermissibly coercive school-sponsored religious speech – bearing the school's imprimatur – and private student speech protected by the First Amendment. The Eleventh Circuit found the state's policy of permitting non-proselytizing, non-sectarian, student-initiated prayer at school-sponsored events, including graduations and football games, did not violate the Establishment Clause. *Id.*

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[2] In *Chandler I*, *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), decided prior to *Santa Fe*, the Eleventh Circuit found against plaintiffs who were challenging a school district policy based on State law that permitted student-initiated prayer at school functions. *Chandler v. Siegelman*, 230 F.3d at 1314. The plaintiffs then filed for *certiorari*. On June 19, 2000, this Court decided *Santa Fe*. Then, on June 26, 2000, this Court granted plaintiffs' *writ of certiorari* in *Chandler I* and vacated the Eleventh Circuit's judgment to allow consideration on remand in light of *Santa Fe*. The Eleventh Circuit then found that *Chandler I* was not in conflict with *Santa Fe*, reaffirming and reinstating it in *Chandler v. Siegelman*, 230 F.3d at 1317.

[3] In *Chandler I*, the Eleventh Circuit did not directly address the issue. The Eleventh Circuit held in part that a school district could not "prescribe prayer or allow state employees to lead, participate in or otherwise endorse prayer of any type during curricular or extracurricular events." *Chandler I*, 180 F.3d at 1257 (*See also id.* at n.4.) In addition, the court held that for teacher supervision of student-initiated, student-led prayer to be unconstitutional, "it must cross the line into active endorsement, encouragement or participation." *Id.* at 1265.

at 1317. The Eleventh Circuit pointed out that the *Santa Fe* holding "does not obliterate the difference between state speech and private speech at school sponsored events . . . nor does it hold that all religious speech is inherently coercive" in this context. *Id.* at 1316. The Eleventh Circuit noted that in *Santa Fe,* the speech was coercive because the school district entangled itself with the prayers to a degree where the speech became the school's, not because the prayers occurred at a school-sponsored event. The Eleventh Circuit correctly interpreted *Santa Fe* as *only forbidding state-sponsored coercive religious speech. Id.* Where the State has no involvement in the students' prayer choices, the decision to pray cannot be coercive. Thus, Coach Borden's passive, symbolic demonstration of respect for his players *after* they choose to pray cannot constitute government coercion or state sponsorship of those prayers.

II. The Third Circuit failed to provide First Amendment viewpoint protection to student-initiated, student-led prayer, thereby allowing EBSD's policy to have the effect of chilling constitutionally protected student speech.

This Court has consistently held that students' constitutional rights to freedom of speech and expression are protected within the public school setting. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring). The Court

has also consistently recognized religious viewpoints in the school context as legitimate and protected by the First Amendment.[4] In this case, when the players pray, they are expressing a constitutionally protected viewpoint, which the government, by its mandate of neutrality, must not only tolerate but also accommodate. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The EBSD, however, fosters an environment hostile to religion through its policy and actions

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[4] In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) the Court held a school district engaged in viewpoint discrimination when it did not allow the presentation of movie from a religious perspective noting, "religious speech is a fully protected subset of free speech." Similarly in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); the Court again found viewpoint discrimination by a school district not allowing the teaching of morals and character development from a religious perspective. Finally in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) the Court found viewpoint discrimination by a university refusing funding to a religion-centric extra-curricular magazine. In each of these cases, as with the EBSD, the government's defense for attempting to silence these viewpoints was fear of an Establishment Clause violation. The Court found in each of these cases the violation was actually the schools' own discrimination against students' First Amendment rights. To be sure, these cases involved extra-curricular activities in limited public fora, which the Court failed to extrapolate to the circumstances in *Santa Fe*. 530 U.S. 302-03. However, the Court based its findings on the facts: the speech in question was the government's own and it resulted in coercion. Here, as in the case with extra-curricular activities, the speech involved is pure student speech uncoerced by any government pressure and thus more akin to the situations in *Good News Club*, *Lamb's Chapel* and *Rosenberger*.

regarding religious viewpoints and student speech, *i.e.* prayer. The EBSD purports to take a constitutionally mandated, religiously neutral stance by constructing a policy that forbids employee participation in school prayer. *Borden*, 523 F.3d at 160-61. What *Santa Fe* held and what the Third Circuit failed to consider, however, was that facially neutral policies are not all that are required to achieve true neutrality. As the Court in *Santa Fe* observed, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." 530 U.S. at 307 n.21; *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in judgment); *see also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534-35 (1993) (making the same point in the Free Exercise context). Thus, the District must take into account the effect a facially neutral policy has on the student body, so its action does not result in "neutrality in name but hostility in fact." *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part and concurring in the judgment). If, as in *Santa Fe*, the effect of a school's prayer policy is to make the students with "secular viewpoints" feel awkward, coerced, uncomfortable or not part of a "favored political class," then surely the opposite must also be true. *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring). Facially neutral policies, administered by a government in a manner hostile to religious expression because it makes believers feel awkward,

coerced or uncomfortable, must also be unconstitutional.

The EBSD's policy creates a condition that directly harms and discourages otherwise protected student-led prayer. The effect on the players resulting from EBSD's religiously hostile policy is uncontroverted. Team captain Nixon testified that forbidding Coach Borden from demonstrating respect for his players' constitutionally protected speech made Nixon and the other players feel awkward, and hurt the team's morale and spirit. (Nixon Decl. ¶ 5.) These effects and emotions experienced by the team are no less coercive *against* student prayer than the coercion *for* student prayer in *Santa Fe*. The EBSD's policies cultivate an environment that chills the students' constitutionally protected speech. The Court in *Lee* stated, "the government may no more use social pressure to enforce orthodoxy than it may use direct means." 505 U.S. at 592. The EBSD attempts to enforce a similar, and no less virulent, secular orthodoxy. The EBSD allows the students to pray, but chills that speech by creating a hostile environment that lowers morale, harms the spirit and causes students who choose to pray to feel awkward and unwelcome.

As the Court in *Santa Fe* noted, the history and context in which schools form policies is important. 530 U.S. at 317 (quoting *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in judgment)). In 1993, the Third Circuit chastised the EBSD for its efforts to explore every legal way

possible to deny religious groups an equal opportunity to meet and discuss viewpoints on school grounds. *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993). The lead opinion in the present case dismissed this prior admonishment in a footnote, noting the school had allowed Coach Borden to participate in prayers with the team in the intervening years. 523 F.3d at 178 n.22. The fact remains that when the current controversy confronted the EBSD, it reverted to the same tactic employed in *Pope*, utilizing every legal means to stifle protected student speech and to demonstrate hostility toward religion.

The EBSD manifests a hostile attitude toward religious viewpoints in several ways. First, the prayer policy threatens termination of any employee who demonstrates respect when the students exercise their constitutional rights. 523 F.3d at 160. Second, EBSD board president Michael Baker derided Coach Borden's desire to demonstrate respect for his players as a "personal agenda" during a board meeting about the policy and the nascent controversy. *Id.* Third, in brief and oral argument before the district court, the EBSD asserted that it simply desired a clarification of the District's and Coach Borden's rights. *Id.* at 185. When the district court ruled against EBSD, however, its anti-religious bias became evident. Now free from potential Establishment Clause litigation, it nevertheless appealed to the Third Circuit. This decision is not surprising given the EBSD's historically anti-religious bias. Just as the Court found a ruse in the

SFSD's supposedly "religion neutral" policy, an equal and opposite ruse is afoot in the EBSD's anti-religion policy. 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). Moreover, much like this Court did not allow the suppression of minority viewpoints in *Santa Fe,* it should not allow the EBSD's suppression of the players' religious viewpoints.

III. The Court should clarify and unify the test in school environment religious expression cases by articulating and adopting a Coercion test which allows passive and symbolic conduct by government actors, protects individual viewpoints, and does not chill constitutionally protected student-initiated and student-led prayer in a school environment.

The Court's self-described "tangle" of various tests leaves circuit courts, district courts and the attorneys practicing in them a confusing, convoluted maze through which they must travel to determine the most efficient way to adjudicate and litigate Establishment Clause cases. *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment and dissenting in part). Other Justices acknowledge this ambiguity and describe the Court's approaches as "embarrassing," *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting), and in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring). Legal

scholars also have criticized the Court's seemingly haphazard approach: "a more confused and often counterproductive mode of interpreting [the religion clauses of] the First Amendment would have been difficult to devise." Michael W. McConnell, *Exchange; Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992). *See also* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, 163 (MacMillan 1986) ("the Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices.").

While scholars may engage in hyperbole, the fact remains that the Court can implement a single straightforward test in this area of constitutional law. The Court's failure to articulate such a standard will result in continuing anomalies like *Borden*. The best alternative to help clarify the disparate standards is the Coercion test articulated by Justice Kennedy in *Lee*. The test discounts passive and symbolic government conduct, ensures the courts will recognize all religious and nonreligious perspectives and provides proper constitutional protections for private speech in this context.

A. The Court currently applies at least three tests for adjudicating Establishment Clause cases like the instant case, which leads to disparate findings of constitutional protection for similar speech.

The oldest of the tests currently employed is the *Lemon* test. First developed in 1971 in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1991), it requires a three-step examination to determine the constitutionality of government action involving religion. Such action: (i) must have a secular purpose; (ii) its primary effect must neither advance nor inhibit religion; and (iii) it must avoid excessive government entanglement with religion to pass constitutional scrutiny. *Id.* The Court rarely follows this test alone, although it is often invoked. For example, the Court has alternately used it when a lower court did not, *e.g.*, *Lamb's Chapel*, 508 U.S. 384, and discarded it when it was the lower court's exclusive analytical tool, *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). The Court has also incorporated the test, but not in a dispositive manner, describing the test's elements as "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Unsurprisingly, multiple Justices, including Kennedy, *Allegheny*, 492 U.S. at 656 (concurring in the judgment and dissenting in part), O'Connor, *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (dissenting), Rehnquist, *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (dissenting), and Thomas, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-8 (2004) (concurring), have criticized the

test and/or berated the Court for its uneven application. Justice Scalia's disparagement has been especially acerbic: "[the test] like some ghoul in a late night horror movie that repeatedly sits up in its grave . . . after repeatedly being killed and buried . . . stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys . . . " *Lamb's Chapel*, 508 U.S. at 397 (concurring in the judgment).

The second test, applied more frequently in recent years, is the Endorsement test. This test originated in Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 688. The test is based on the premise that government may neither endorse nor disapprove of religion. A perceived government endorsement of religion sends a message to nonbelievers that they are "outsiders" and to adherents that they are "favored members of the political community." *Id.* The Court employs a "reasonable observer" standard, taking into account the government action's context and history to probe government endorsement. *Pinette*, 515 U.S. at 772. Like its predecessor, this test, while appearing neutral on its face, actually has a strong anti-religious predisposition because the very nature of "establishment" indicates actions imbuing government approval or support for religion. James A. Campbell, *Note: Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 Akron L. Rev. 541, 555 (2006). Thus, while a fervently secular

hypothetical government could wipe all religious remnants from society, its actions could not be construed as "establishing" religion. Accordingly, the Court has not applied the Endorsement test to invalidate government activity condemning religion. *Id.* (quoting McConnell, *Crossroads, supra* p.16, at 152).

Justice Kennedy has recognized the inherently flawed nature of the Endorsement test and has written extensively about its shortcomings. He writes in *Allegheny*, 492 U.S. at 668-69 (concurring in the judgment and dissenting in part), the Endorsement test is "flawed in its fundamentals and unworkable in practice," and its addition to Establishment Clause jurisprudence "most unwelcome." One of the problems with the Endorsement test is that it would result in a radical separation of church and state, a result not envisioned by our founding fathers, never required by the Court of any era and anathema to the history and traditions of the United States. *Lynch*, 465 U.S. at 673. As Justice Kennedy noted: "Whatever test we choose to apply must permit not only legitimate practices two centuries old, but also any other practices with no greater potential for an establishment of religion." *Allegheny*, 492 U.S. at 670 (concurring in the judgment and dissenting in part). Indeed, according to Justice Kennedy, "the United States Code itself contains religious references that would be suspect under the endorsement test." *Id.* at 672.

The latest test in the Court's litany is the Indirect Coercion test, first championed by Justice Kennedy in *Lee*, 505 U.S. at 587. It holds the government

may not coerce (directly or indirectly) anyone to support or participate in any religion or its exercise and may not "act in a way which tends to establish a state religious faith or tends to do so." *Id.* While "coercion" is a good basis from which to draw a uniform standard, the subjective nature of indirect coercion has been criticized because it places judges in the position of amateur psychologists rather than jurists, sometimes relying on easily manipulatable psychological studies. *Id.* (Scalia, J., dissenting).

B. The Court should articulate and adopt a single test that does not implicate passive or symbolic government conduct when determining an Establishment Clause violation, yet affords constitutional protection for private speech in a public school environment.

The most sensible test is a Coercion test that discounts passive and symbolic government speech as too tenuous to rise to the level of an Establishment Clause violation. This reasonable and clear standard continues to allow government to sponsor events at which a religious invocation is given, as in *Lee*, while protecting practices that have no likelihood of "establishing a religion or tending to do so." 505 U.S. at 580; *Lynch*, 465 U.S. at 678. Indeed, Justice Kennedy warned of the dangers of making too tenuous a connection between government conduct and the establishment of religion: "Absent coercion, the risk of infringement of religious liberty by passive or

symbolic accommodation is minimal." *Allegheny*, 492 U.S. at 662 (concurring in the judgment and dissenting in part). A Coercion test that eliminates passive and symbolic conduct from consideration remains true to Justice Kennedy's ideals of preventing government coercion while not directly benefiting religion. This test also allows the "benevolent neutrality" absent from the Court's current approaches. *Id.* at 661. Eliminating any passive or symbolic conduct from suspect status would also enable the Court to read the religion clauses of the First Amendment in a manner more closely aligned with the original understanding of the clauses and truer to the United States' history and traditions. "The history of the Religion Clauses dispels any notion that government is forbidden from affirming, through language or symbol, the special status of religion in public life." Christal L. Hoo, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 Penn. St. L. Rev. 683, 698 (2004). The government has engaged in passive and symbolic, non-coercive conduct since the founding. The United States remains the envy of the world for its religious tolerance. The government may achieve true neutrality only by applying a test that allows this accommodation to remain and flourish.

CONCLUSION

For the reasons provided above, the petition for *writ of certiorari* should be granted.

Respectfully submitted,

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